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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT AND COMPLAINT

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March 29, 1979

The Daily Record Co., Baltimore, Md. 21202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. , Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
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PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT

Pursuant to Rule 9 of the Rules of the Supreme Court, the State of Maryland, the State of Illinois, the State of Indiana, the Commonwealth of Massachusetts, the State of Michigan, the State of New York, the State of Rhode Island and Providence Plantations, and the State of Wisconsin, by their attorneys, ask leave of this Court to file the Complaint against the State of Louisiana submitted herewith.

As is more fully set forth in the accompanying Brief in Support of Motion for Leave to File Complaint, the plaintiffs respectfully submit:

1. The State of Louisiana has imposed a "First Use Tax" on natural gas from the Outer Continental Shelf and on natural gas from other countries and other

states, in transit in interstate commerce to plaintiff states.

2. The economic impact of the Louisiana "First Use Tax" on plaintiff states as consumers would exceed 1.5 million dollars annually, and the economic impact of the tax on the general welfare of plaintiff states would exceed 120 million dollars annually.

3. The Louisiana "First Use Tax" violates the rights and protections guaranteed to plaintiff states and their citizens by article I, section 8, clause 3 ("the commerce clause") and other provisions of the United States Constitution.

WHEREFORE, plaintiff states respectfully request that this Court grant their Motion for Leave to File Complaint.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. , Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

COMPLAINT

Maryland, Illinois, Indiana, Massachusetts, Michigan, New York, Rhode Island, and Wisconsin, by their attorneys, bring this civil action to obtain declaratory and injunctive relief against Louisiana, and complain and allege as follows:

JURISDICTION AND STANDING

I.

The exclusive original jurisdiction of this Court is invoked under the Constitution of the United States, article III, section 2, clauses 1 and 2 ("Controversies between two or more States"), and 28 U.S.C. § 1251(a)(1) (1976). Plaintiffs have no other plain, speedy or adequate remedy at law and have no remedy whatsoever in any other federal court.

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II.

This action seeks a declaratory judgment, pursuant to 28 U.S.C. §§ 2201-2202 (1976), that the State of Louisiana's First Use Tax on Natural Gas, Act. No. 294, 1978 La. Sess. Law Serv. 482 (West) (to be codified as LA. REV. STAT. ANN. §§ 47:1301-1307) (hereinafter referred to as "First Use Tax," a copy of which is attached hereto as Exhibit A and incorporated herein by reference), violates the rights and protections afforded to plaintiffs by the United States Constitution under article I, section 8, clause 3 (commerce clause); article I, section 10, clause 1 (impairment of contracts clause) and clause 2 (import-export clause); and article VI, clause 2 (supremacy clause), and denies to plaintiffs the equal protection of the laws guaranteed by the fourteenth amendment. This suit also seeks to enjoin permanently the enforcement of the First Use Tax and to compel Louisiana to refund all revenues collected during the pendency of this action with all interest earned on such revenues.

III.

The plaintiffs are the sovereign State of Maryland, with its capitol located at Annapolis, Maryland; the sovereign State of Illinois, with its capitol located at Springfield, Illinois; the sovereign State of Indiana, with its capitol located at Indianapolis, Indiana; the sovereign Commonwealth of Massachusetts, with its capitol located at Boston, Massachusetts; the sovereign State of Michigan, with its capitol located at Lansing, Michigan; the sovereign State of New York, with its capitol located at Albany, New York; the sovereign State of Rhode Island and Providence Plantations, with its capitol located at Providence, Rhode Island; and the sovereign State of Wisconsin, with its capitol located at Madison, Wisconsin. Plaintiffs bring this action in their proprietary capacities as substantial purchasers of

natural gas upon which the First Use Tax will be imposed, and in those capacities will sustain substantial monetary damages as a result of the First Use Tax. Plaintiffs also bring this action in their *parens patriae,* or quasi-sovereign capacities, as guardians of the health, welfare and prosperity of the citizens of Maryland, Illinois, Indiana, Massachusetts, Michigan, New York, Rhode Island, and Wisconsin.

IV.

The defendant is the sovereign State of Louisiana, with its capitol located at Baton Rouge, Louisiana.

LOUISIANA FIRST USE TAX

V.

The First Use Tax will be imposed, at a rate of seven cents per thousand cubic feet ("Mcf") (§ 47:1303B) "upon the first occurrence within [Louisiana] of any use . . . of any natural gas upon which no severance tax or tax upon the volume of production has been paid, or is legally due to be paid, to this state or any other state or territory of the United States, or which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country." § 47:1303A. The tax, however, "shall not apply to natural gas otherwise subject thereto when such gas is used or consumed in the drilling for or production of oil, natural gas, sulphur, or in the processing of natural gas for liquids extraction within the state; nor shall it apply to gas shrinkage volumes attributable to the extraction of ethane, propane, butanes, natural or casinghead gasoline or other liquefied hydrocarbons . . . [;] nor shall it apply to natural gas used or consumed in the manufacture of fertilizer and anhydrous ammonia within the state." *Id.*

VI.

Use is defined as "[1] the sale; [2] the transportation in [Louisiana] to the point of delivery at the inlet of any processing plant; [3] the transportation in [Louisiana] of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; [4] transfer of possession or relinquishment of control at a delivery point in [Louisiana]; [5] processing for the extraction of liquefiable component products or waste materials; [6] use in manufacturing; [7] treatment; or [8] other ascertainable action at a point within [Louisiana]." § 47:1302(8).

VII.

The First Use Tax is characterized by Louisiana as "a cost associated with uses made by the owner in preparation of marketing of the natural gas." § 47:1303C. The term "owner" is defined as "the person or person [*sic*] having title to and the right to alienate the natural gas subject to the tax at the time a use occurs in [Louisiana]." § 47:1302(9). Any contract providing that the owner shall have "a right to reimbursement or refund of such taxes from any other party in interest, other than a purchaser of such natural gas, is . . . declared to be against public policy and unenforceable to that extent." § 47:1303C. The statute recites that the First Use Tax shall not be imposed upon "the production, severance, or ownership of natural gas produced outside of the boundaries of the state of Louisiana . . . [and] that the incidence of this tax shall not be upon the natural gas nor upon the property or rights from which it is produced, but rather shall be only upon the privilege of performance or allowing the performance, by the owner, of the enumerated actions comprising first use within [Louisiana]." § 47:1303E.

VIII.

The purpose of the First Use Tax is stated to be "the exaction of fair and reasonable compensation to the citizens of [Louisiana] for the costs incurred and paid with public funds, which costs enure solely to the benefit of the owners of natural gas produced beyond the boundaries of Louisiana, although introduced into [Louisiana], and to provide some measure of reimbursement to the citizens for damages to [Louisiana's] waterbottoms, barrier reefs, and sensitive shorelines as a direct consequence of activity within the state associated with such natural gas by the owners thereof." § 47:1301C. Louisiana asserts that the tax is imposed because "the imposition of a tax upon the severance of [oil and natural gas] from the soil and water of [Louisiana] fail[s] to prevent the economic waste of these Louisiana natural resources and will unfairly tax [Louisiana] producers in a discriminatory fashion, unless [Louisiana] equally and uniformly taxes the introduction for the first time into the economy of [Louisiana] natural gas which has not been otherwise or elsewhere subject to taxation by or within the United States." § 47:1301A.

IX.

The First Use Tax is due and payable "monthly on or before the last day of the month following the month to which the tax is applicable." § 47:1305B. If the tax is not paid in a timely manner the owner is "subject to the addition of interest, penalties, and costs." § 47:1306A. If the tax is not paid "within ninety days, . . . the natural gas shall be deemed illegal gas . . . and, as such, shall be treated as contraband and shall be seized and sold." § 47:1306B.

NATIONAL IMPACT OF THE FIRST USE TAX

X.

The First Use Tax will be required to be paid by interstate natural gas pipeline companies who transport through Louisiana natural gas produced outside the boundaries of that State. Each of these pipeline companies is a "natural gas company" as defined in Section 2 of the Natural Gas Act, 52 Stat. 821, 15 U.S.C. § 717a(6) (1976), and is regulated by the Federal Energy Regulatory Commission ("FERC") as successor to the Federal Power Commission.

XI.

The interstate pipelines upon whom the tax will be imposed purchase substantial quantities of natural gas produced from the Outer Continental Shelf ("OCS"), a federal domain defined and delineated in the Outer Continental Shelf Lands Act, 67 Stat. 462-70, 43 U.S.C. §§ 1331-1343 (1976), outside the seaward boundaries of the State of Louisiana. Each interstate pipeline purchases said gas from producers pursuant to certificates of public convenience and necessity issued by the FERC, and transports or has such gas transported through pipelines, into and through the State of Louisiana, for sale to, *inter alia,* gas distributing companies and municipalities for resale, under certificates of public convenience and necessity issued by FERC, and under rate schedules or tariffs on file with and approved by FERC.

XII.

It is estimated by FERC that the First Use Tax will be imposed on approximately 3,190 million Mcf of natural gas entering Louisiana in interstate commerce from the OCS annually. This volume is based on total OCS production entering Louisiana in 1977 of

3,647,513,674 Mcf, less 220 million Mcf in shrinkage during processing; less 100 million Mcf owned by the producer of the gas reserved for the producer's own use or direct industrial sales and not subject to FERC's rate jurisdiction; less 140 million Mcf consumed in the production of fertilizer and anhydrous ammonia in Louisiana. In addition, the First Use Tax will be imposed on all volumes of natural gas imported into the United States from foreign countries which are transported through Louisiana in the foreign and interstate commerce of the United States.

XIII.

In Docket No. RM78-23 (*State of Louisiana First Use Tax in Pipeline Rate Cases*), Order No. 10 ("Order Establishing Procedures Governing Pipeline Recovery of the State of Louisiana First Use Tax," issued August 28, 1978, 43 Fed. Reg. 45,553 (Oct. 3, 1978)); Order No. 10-A ("Order on Rehearing, Modifying Prior Order, Amending Regulation and Requesting Comments," issued December 20, 1978, 43 Fed. Reg. 60,438 (Dec. 28, 1978)), *appeal docketed, Tennessee Gas Pipe Line Co. v. Federal Energy Regulatory Commission,* No. 78-3813, *et al.* (5th Cir. Dec. 26, 1978)), and Order No. 10-B ("Order on Rehearing, Modifying Prior Order and Amending Regulations," issued March 2, 1979, 44 Fed. Reg. 13,460 (Mar. 12, 1979)), FERC has adopted procedures which, under the conditions specified in those orders, permit the pipelines required to pay the First Use Tax to collect the amount of such tax from their customers pursuant to an automatic tracking mechanism. Those charges remain subject to refund with interest, pending a final judicial determination of the constitutionality of the First Use Tax.

XIV.

Based on the OCS volumes entering Louisiana in interstate commerce in 1977, the imposition of the First Use Tax will cost interstate consumers approximately 225 million dollars per annum.

IMPACT OF THE FIRST USE TAX UPON THE PLAINTIFF STATES AND THEIR CITIZENS

XV.

On April 1, 1979, the effective date of the First Use Tax, the plaintiff states and their citizens will be impacted by the First Use Tax, with resulting economic burdens and hardships. The natural gas supplies of each plaintiff state and of the citizens of each plaintiff state are delivered by interstate natural gas pipeline companies who will be subject to the tax and who will collect such tax from plaintiff states and their citizens.

XVI.

On the basis of its current annual usage of natural gas of approximately 2 million Mcf, the First Use Tax on that portion of its usage subject to the tax will cost the State of Maryland approximately 60 thousand dollars annually. The State of Maryland is also an indirect consumer of large quantities of natural gas through its numerous instrumentalities, such as local school district, towns, villages and cities.

XVII.

The total direct economic cost of the First Use Tax on Maryland, its instrumentalities, and its citizens is estimated to be approximately 4 million dollars annually.

XVIII.

On the basis of its current annual usage of natural gas of approximately 7 million Mcf, the First Use Tax on that portion of its usage subject to the tax will cost the state of Illinois approximately 270 thousand dollars annually. The State of Illinois is also an indirect consumer of large quantities of natural gas through its numerous instrumentalities, such as local school districts, towns, villages and cities.

XIX.

The total direct economic cost of the First Use Tax on Illinois, its instrumentalities, and its citizens is estimated to be 33 million dollars annually.

XX.

On the basis of its current annual usage of natural gas of at least 1 million Mcf, the First Use Tax on that portion of its usage subject to the tax will cost the State of Indiana approximately 70 thousand dollars annually. The State of Indiana is also an indirect consumer of large quantities of natural gas through its numerous instrumentalities, such as local school districts, towns, villages and cities.

XXI.

The total direct economic cost of the First Use Tax on Indiana, its instrumentalities, and its citizens is estimated to be approximately 9 million dollars annually.

XXII.

On the basis of its current annual usage of natural gas of at least 500 thousand Mcf, the First Use Tax on that portion of its usage subject to the tax will cost the Commonwealth of Massachusetts at least 25 thousand dollars annually. The Commonwealth of Massachusetts

is also an indirect consumer of large quantities of natural gas through its numerous instrumentalities, such as local school districts, towns, villages and cities.

XXIII.

The total direct economic cost of the First Use Tax on the Commonwealth of Massachusetts, its instrumentalities, and its citizens is estimated to be approximately 8 million dollars annually.

XXIV.

On the basis of its current annual usage of natural gas of approximately 21 million Mcf, the First Use Tax on that portion of its usage subject to the tax will cost the State of Michigan approximately 650 thousand dollars annually. The State of Michigan is also an indirect consumer of large quantities of natural gas through its numerous instrumentalities, such as local school districts, towns, villages and cities.

XXV.

The total direct economic cost of the First Use Tax on Michigan, its instrumentalities, and its citizens is estimated to be approximately 30 million dollars annually.

XXVI.

On the basis of its current annual usage of natural gas of approximately 8.5 million Mcf, the First Use Tax on that portion of its usage subject to the tax will cost the State of New York approximately 300 thousand dollars annually. The State of New York is also an indirect consumer of large quantities of natural gas through its numerous instrumentalities, such as local school districts, towns, villages, and cities.

XXVII.

The total direct economic cost of the First Use Tax on New York, its instrumentalities and its citizens is estimated to be approximately 29 million dollars annually.

XXVIII.

On the basis of the current annual usage of natural gas of approximately 330 thousand Mcf, the First Use Tax on that portion of its usage subject to the tax will cost the State of Rhode Island and Providence Plantations approximately 25 thousand dollars annually. The State of Rhode Island and Providence Plantations is also an indirect consumer of large quantities of natural gas through its numerous instrumentalities, such as local school districts, towns, villages and cities.

XXIX.

The total direct economic cost of the First Use Tax on the State of Rhode Island and Providence Plantations, its instrumentalities, and its citizens is estimated to be over 370 thousand dollars annually.

XXX.

On the basis of its current annual usage of natural gas of approximately 4 million Mcf, the First Use Tax on that portion of its usage subject to the tax will cost the State of Wisconsin approximately 70 thousand dollars annually. The State of Wisconsin is also an indirect consumer of large quantities of natural gas through its numerous instrumentalities, such as local school districts, towns, villages and cities.

XXXI.

The total direct economic cost of the First Use Tax on Wisconsin, its instrumentalities, and its citizens is

estimated to be between 8.8 and 10 million dollars annually.

XXXII.

In the aggregate, the First Use Tax will cost plaintiff states at least 1.5 million dollars annually and will cost plaintiff states and their citizens approximately 120 million dollars annually. The total economic impact of the First Use Tax upon plaintiff states and their citizens, including indirect multiplier effects, is estimated to be significantly greater.

FIRST CAUSE OF ACTION

XXXIII.

Plaintiffs reallege, as though set forth in full, the allegations contained in Paragraphs I through XXXII.

XXXIV.

The First Use Tax constitutes an unreasonable, unlawful, and prohibited burden on interstate commerce, in contravention of article 1, section 8, clause 3 of the United States Constitution (commerce clause) which provides, in pervides, in pertinent part, that:

> The Congress shall have Power . . . [to] regulate . . . Commerce . . . among the several States . . . .

The First Use Tax violates the commerce clause in that it burdens natural gas moving in interstate commerce, it is not applied to activities with a substantial nexus with Louisiana, it is not fairly apportioned, it discriminates against interstate and foreign commerce, and it is not fairly related to the asserted cost burdens imposed upon Louisiana by the interstate commerce subject to the tax, or to the value of the services and benefits provided by the State.

A. THE FIRST USE TAX BURDENS NATURAL GAS MOVING IN INTERSTATE COMMERCE.

XXXV.

Entry of natural gas into Louisiana from the OCS or from a sister state or foreign country constitutes movement in interstate commerce, as does the subsequent transportation of this gas out of Louisiana to consumers in other states. This continuous movement is not interrupted by the alleged "uses" defined in Paragraph VI, *supra,* because the activities described therein are integral to the movement of such gas from the point of production to the point of ultimate consumption in Louisiana or other states. Insofar as the First Use Tax is deemed to apply to natural gas produced from the OCS, or imported from a foreign country, which is transported into and through Louisiana, it is a tax on natural gas moving in interstate commerce. Thus, the effect of the First Use Tax is to tax directly the privilege of transporting natural gas in interstate commerce and not to tax the use of such gas.

B. THE USES TAXED BY THE FIRST USE TAX DO NOT HAVE A SUFFICIENT NEXUS WITH LOUISIANA TO JUSTIFY IMPOSITION OF THE TAX.

XXXVI.

The uses described in § 47:1302(8) do not have a sufficient nexus with Louisiana to justify the imposition of the First Use Tax, computed on the basis of the total volume of natural gas produced from the OCS or imported into the United States, which is transported through Louisiana pursuant to certificates of public convenience and necessity issued by FERC. In particular, the transportation of natural gas through Louisiana does not establish a sufficient nexus to justify a tax on the total volume of OCS and imported gas moving through the State. Moreover, the imposition of the First

Use Tax on such gas on the basis of "other ascertainable action at a point within [Louisiana]" (§ 47:1302(8)) fails to establish a sufficient nexus with Louisiana. The phrase is unreasonably vague, and fails to establish the nexus required to justify the tax.

C. THE FIRST USE TAX IS NOT FAIRLY APPORTIONED.

XXXVII.

The First Use Tax is not fairly apportioned. The tax is applied to the total volume of imported gas, and gas from the OCS, transported into Louisiana, without limitation to the volumes of such gas consumed in Louisiana. The tax is not related to investment in facilities, actual business activities, payroll, or other indicia of a concrete nexus with Louisiana. The tax is a tax on the gas, not on local activities.

XXXVIII.

In addition, this lack of apportionment exposes OCS and imported gas to multiple tax burdens because, if Louisiana is permitted to impose such a tax, every state through which such gas passes may also do so. There are measurement and storage facilities in many of the states through which natural gas passes between Louisiana and the plaintiff states, and gas is frequently processed, exchanged, or subjected to analogous "uses" in such states.

D. THE FIRST USE TAX UNDULY DISCRIMINATES AGAINST INTERSTATE COMMERCE.

XXXIX.

The First Use Tax, sometimes in conjunction with other Louisiana statutes, unfairly, unreasonably, and unduly discriminates against interstate commerce, as is described in paragraphs XL to XLII.

XL.

The First Use Tax discriminates against interstate commerce because it is imposed only on gas produced from the OCS and from other states and gas imported into the United States. Such gas is moving in interstate or foreign commerce at the time it is transported into Louisiana, and continues in interstate commerce, without interruption, until it is transported out of Louisiana or sold at wholesale for ultimate consumption within Louisiana. An equivalent tax is not imposed on gas produced in Louisiana and sold in interstate or intrastate commerce, which is permitted to enter interstate commerce without bearing the burden of the First Use Tax. Thus, the statute gives discriminatory tax advantages to owners of gas produced within the boundaries of the State of Louisiana, in comparison to owners of gas produced elsewhere.

XLI.

The Louisiana First Use Tax on Natural Gas — Severance Tax Credit, Act No. 436, 1978 La. Sess. Law Serv. 842 (West) (to be codified as LA. REV. STAT. ANN. § 47:647) (a copy of which is attached hereto as Exhibit "B" and incorporated herein by reference), permits an in-state producer of natural gas who is liable for the First Use Tax and who does not have an enforceable right of reimbursement to credit that liability, dollar-for-dollar, against its liability for the Louisiana severance tax (LA. REV. STAT. ANN. §§ 47:631-646) (West 1970 and Supp. 1978) up to the amount of such liability. The First Use Tax, applied in conjunction with the Severance Tax Credit, discriminates against interstate commerce because it favors taxpayers who own gas subject to the Louisiana severance tax, *i.e.*, taxpayers who are engaged in in-state production of natural resources, and burdens taxpayers who do not own such gas, *i.e.*, taxpayers who are not engaged in in-state

production. The ultimate impact of this discrimination will fall on plaintiff states and their citizens, because under FERC Orders Nos. 10, 10-A, and 10-B the interstate pipeline companies will be allowed to pass through to consumers the amount of First Use Tax paid, and because other costs suffered by the pipelines, such as incomplete recovery of interest in the event the First Use Tax is ruled unconstitutional, may ultimately be found by FERC to be just and reasonable costs that are chargeable to the ratepayers under the Natural Gas Act.

XLII.

The First Use Tax discriminates against interstate commerce because it exempts from liability for the tax volumes of natural gas, otherwise subject to the tax, consumed in specified uses in Louisiana, such as the manufacture of sulphur, fertilizer, and anhydrous ammonia. § 47:1303A. Volumes of natural gas subject to the tax consumed in similar uses in other states are not given a similar exemption. Louisiana has, therefore, favored certain in-state uses to the disadvantage of similar out-of-state uses.

E. THE FIRST USE TAX IS NOT FAIRLY RELATED TO SERVICES PROVIDED BY LOUISIANA.

XLIII.

The First Use Tax is not fairly related to the express purpose of the statute, *i.e.*, compensating the citizens of Louisiana for damage to Louisiana's "waterbottoms, barrier reefs, and sensitive shorelines" because of the movement of OCS or imported gas through the state. § 47:1301C. The disproportionate amount of the tax in relation to its avowed purpose demonstrates that the primary purpose of the tax is to raise revenue rather than to protect the environment. An equivalent tax is not imposed on natural gas produced in Louisiana, or

on gas produced in any other state that imposes a severance or production tax on gas. Substantial volumes of natural gas produced in Louisiana and other states are transported into and through Louisiana in the same facilities used to transport OCS and imported gas. These volumes of gas traverse Louisiana's waterbottoms, barrier reefs, and shorelines, but are not subject to the First Use Tax. In addition, Louisiana has not imposed a similar tax on other forms of transportation, *i.e.,* barges and shipping, which also "damage" Louisiana's waterbottoms, barrier reefs, and shorelines.

XLIV.

The rate of First Use Tax is the same as the rate of the severance tax on gas produced within Louisiana, but the economic impact resulting from any first use as defined in the statute within the State of Louisiana is wholly disproportionate to the economic impact resulting from severance.

XLV.

The impact of the First Use Tax on the pipelines upon whom it will be imposed varies without any rational relationship to: (1) the activities of the pipelines in the State; (2) the adverse impact of such activities on the State; or (3) the benefits received from the State by the pipelines.

SECOND CAUSE OF ACTION

XLVI.

Plaintiffs reallege, as though set forth in full, the allegations contained in Paragraphs I through XXXII.

XLVII.

The First Use Tax is in conflict with and repugnant to federal statutes and is accordingly void under the

supremacy clause, article VI of the United States Constitution, as is described in paragraphs XLVIII to L.

XLVIII.

The First Use Tax is in effect an attempt to regulate gas dedicated to interstate markets by contracts and/or FERC certificates of public convenience and necessity issued pursuant to the Natural Gas Act, 52 Stat. 821-33, 15 U.S.C. §§ 717-717w (1976), which is a matter within the exclusive jurisdiction of the Department of Energy and FERC.

XLIX.

The First Use Tax conflicts with and is repugnant to federal statutes, including that Natural Gas Act (52 Stat. 821-33, 15 U.S.C. § 717-717w (1976)), the Natural Gas Policy Act of 1978 (92 Stat. 3350, Pub. L. No. 95-621 (1978)), and the Outer Continental Shelf Lands Act (67 Stat. 462-70, 43 U.S.C. §§ 1331-1343 (1976)), which constitute a comprehensive scheme duly adopted by Congress for the regulation, enforcement and promotion of the production of natural gas and the sale, transportation and pricing of interstate gas.

L.

Section 7(c) of the Natural Gas Act (56 Stat. 83, 15 U.S.C. § 717f(c)) provides that no person may sell or transport natural gas in interstate commerce for resale without first obtaining a certificate of public convenience and necessity from FERC. These certificates are made in full recognition of, and generally incorporate, the terms and conditions of the underlying contract for the sale of natural gas. Numerous contracts contain provisions requiring the producer or gatherer selling natural gas to an interstate pipeline to reimburse the pipeline for all costs (including any taxes) incurred as a

result of extracting natural gas liquids or other treatment of the gas. The First Use Tax declares such contracts and the existing clauses requiring reimbursement "to be against public policy and unenforceable to that extent." § 47:1303C.

LI.

Section 4 of the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. § 1333(a)(2) (1976), provides that "[s]tate taxation laws shall not apply to the outer Continental Shelf." Notwithstanding the label given to it by Louisiana, the First Use Tax is in economic effect a tax on gas produced from the OCS.

THIRD CAUSE OF ACTION

LII.

Plaintiffs reallege, as though set forth in full, the allegations contained in Paragraphs I through XXXII.

LIII.

The First Use Tax contravenes and violates article I, section 10, clause 2 (import-export clause), of the United States Constitution, which provides, in pertinent part, that:

> No State shall . . . lay any Imposts or Duties on Imports . . . except what may be absolutely necessary for executing its inspection Laws . . . .

Insofar as the First Use Tax applies to gas imported into Louisiana from a foreign country, it violates this provision of the Constitution.

LIV.

The First Use Tax clearly applies to the first use in Louisiana of gas imported into Louisiana from a foreign country, "which is not subject to the levy of any import tax or tariff by the United States as an import

from a foreign country." § 47:1303A. The United States does not now impose "any import tax or tariff" on natural gas imported into the United States. Natural gas may be imported into the United States free of any customs duties, 76 Stat. 72, 19 U.S.C. § 1202, Schedule 4, Part 10, Item 475.15 (1976).

LV.

The First Use Tax is imposed upon, *inter alia*, the sale, transportation, transfer of possession or control, "or other ascertainable action at a point within the state." § 47:1302(8). Insofar as it attempts to tax imported natural gas before it passes into the local distribution system for delivery to ultimate consumers, the First Use Tax is an illegal duty on imports.

LVI.

The First Use Tax complicates the Federal Government's foreign trade policy because it creates special preferences for certain domestic goods and because it will discourage importation of a product governed by federal regulation in a manner inconsistent with that regulation.

LVII.

The First Use Tax will disturb the harmony among the states. It does not fall only upon activities with a reasonable nexus to the state; it is not fairly apportioned; it is discriminatory; and it does not fairly relate to services provided by the State of Louisiana.

LVIII.

The First Use Tax is a direct tax on imports in transit.

FOURTH CAUSE OF ACTION

LIX.

Plaintiffs reallege, as though set forth in full, the allegations contained in Paragraphs I through XXXII.

LX.

The First Use Tax contravenes and violates article I, section 10, clause 1, of the United States Constitution, which provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." Section 47:1303C states, in pertinent part:

> Any agreement or contract by which an owner of natural gas at the time a taxable first use occurs claims a right to reimbursement or refund of such taxes from any other party in interest, other than a purchaser of such natural gas, is hereby declared to be against public policy and unenforceable to that extent.

Section 47:1303C will effectively void provisions in existing contracts for the sale of natural gas in interstate commerce that would otherwise require that owners of natural gas subject to the First Use Tax be reimbursed by persons other than purchasers of the gas. This will in turn cause plaintiff states and their citizens to bear increased costs for natural gas.

FIFTH CAUSE OF ACTION

LXI.

Plaintiffs reallege, as though set forth in full, the allegations contained in Paragraphs I through XXXII.

LXII.

The First Use Tax deprives plaintiff states and their citizens of the equal protection of the law guaranteed under the fourteenth amendment of the Constitution of the United States.

LXIII.

By its Severance Tax Credit (Exhibit B hereto) Louisiana permits any taxpayer directly liable for the payment of the First Use Tax, and any taxpayer liable for the First Use Tax as a consequence of a reimbursement contract provision "applied in disregard" of section 1303C of the First Use Tax, to credit such payments against any severance taxes owed by the taxpayer to Louisiana. § 47:647A.

LXIV.

The Severance Tax Credit further provides that the credit against severance taxes is not allowed if the taxpayer "has an enforceable right to reimbursement from a third party." § 47:647B.

LXV.

Accordingly, under the Severance Tax Credit, the First Use Tax only applies to those taxpayers who have no liability for Louisiana's severance tax. A taxpayer otherwise liable under the First Use Tax may escape such tax liability by crediting such liability against severance taxes owed on its Louisiana production of natural resources.

LXVI.

The First Use Tax as amended by the Severance Tax Credit establishes a classification based on the question of whether the taxpayer is solely engaged in interstate OCS natural gas activity as distinct from the taxpayer who is engaged in both interstate commerce and in-state production. This classification is unreasonable and irrelevant to the purported purposes of the First Use Tax and it results in a denial of equal protection of the law in contravention of fourteenth amendment to the United States Constitution.

WHEREFORE, PLAINTIFFS RESPECTFULLY PRAY THAT THIS COURT:

(a) Declare and adjudge, pursuant to 28 U.S.C. § 2201 (1976), that the Louisiana First Use Tax is unconstitutional and unenforceable with respect to natural gas transported or sold in interstate or foreign commerce;

(b) Issue a permanent injunction prohibiting defendant and its agents and employees from collecting the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce;

(c) Issue a preliminary injunction, pending the final determination of this case, prohibiting defendant and its agents and employees from collecting the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce;

(d) Order that any and all revenues collected pursuant to the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce be refunded to the taxpayers together with interest thereon; and

(e) Grant plaintiff their costs herein expended and such other further relief as the Court may deem just and proper.

Respectfully submitted,

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EXHIBIT A

First Use Tax On Natural Gas

ACT NO. 294

HOUSE BILL NO. 768

An Act to amend Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950 by adding thereto a new Chapter to be designated as Chapter 16 thereof to contain a Part I comprising Sections 1301 through 1307, providing for the levy and collection of a tax on the first use, in the state of Louisiana, of natural gas produced outside of the territorial limits of the state of Louisiana, which is not subject to the levy of an import tax or customs duty by the United States as an import from a foreign country, and upon which no severance tax or tax upon the volume of production has been paid to any state or territory of the United States; providing a definition of first use and for other definitions; providing for exclusions from the tax; providing for the imposition and rate of the tax; declaring certain contractual agreements unenforceable; providing for the point at which the gas is measured and the tax assessed; providing for the reporting and collection thereof and promulgation of regulations; providing for commingling; providing penalties; providing for the disposition of the collections of the tax; and providing otherwise both generally and specifically with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. Chapter 16 of Subtitle II of Title 17 of the Louisiana Revised Statutes of 1950 containing a Part I and comprising Sections 1301 through 1307 of Title 47 is hereby enacted to read as follows:

CHAPTER 16. FIRST USE TAX

Part I. First Use Tax On Natural Gas

§ 1301. State policy

A. The conservation of natural resources is of vital concern to the present and future welfare of our state

and nation, and it is the policy of the state of Louisiana, in the exercise of its police and taxing power, to prevent the physical and economic waste of its natural resources. It is recognized that other existing laws providing limitations upon the production of oil and gas are allowed within the state, and the imposition of a tax upon the severance of these natural resources from the soil and water of the state fail to prevent the economic waste of these Louisiana natural resources and will unfairly tax Louisiana producers in a discriminatory fashion, unless the state equally and uniformly taxes the introduction for the first time into the economy of the state natural gas which has not been otherwise or elsewhere subject to taxation by or within the United States.

B. The waterbottoms, barrier islands and coastal areas within this state are also valuable natural resources, as they provide essential habitat for many forms of wildlife and aquatic life in Louisiana, help protect our coastline from erosion, and are of aesthetic, commercial and recreational value to the citizens of our state and nation. It is further recognized that while other existing laws, applicable to the production of oil and natural gas, provide recompense in the form of taxes to the people of the state of Louisiana for adverse effects on the natural resources, barrier islands, waterbottoms, and shorelands of this state, these laws fail to provide protection for such valuable natural resources or compensation to the people of Louisiana for the necessary adverse effects caused by entry for use for the first time in Louisiana, under the protection of the state's laws, of natural gas which has not been subject to taxation otherwise or elsewhere by or within the United States unless the state levies an equitable tax thereon.

C. It is one of the express purposes of this tax to require the exaction of fair and reasonable compensation to the citizens of this state for the costs incurred and paid with public funds, which costs enure solely to the benefit of the owners of natural gas produced

beyond the boundaries of Louisiana, although introduced into the state, and to provide some measure of reimbursement to the citizens for damages to the state's waterbottoms, barrier reefs, and sensitive shorelands as a direct consequence of activity within the state associated with such natural gas by the owners thereof.

§ 1302. Definitions

The definitions hereinafter set forth shall have the meanings ascribed to them unless the context of use clearly indicates otherwise:

(1) "Oil, condensate, distillate or similar hydrocarbons" are liquid hydrocarbons remaining in a liquid state at 15.025 pounds per square inch absolute and sixty degrees Fahrenheit.

(2) "Natural gas" is natural or casinghead gaseous phase hydrocarbons remaining after separation from either oil, condensate, or distillate and measured at a pressure base of 15.025 pounds per square inch absolute at a temperature base of sixty degrees Fahrenheit.

(3) "Processing" is the scrubbing of a natural gas stream by specifically applied mechanical processes of absorption, adsorption, compression, cooling, cryogenics, refrigeration or any combination thereof for the purpose of extracting natural or casinghead gasoline, methane, ethane, propane, butane and other liquefiable hydrocarbons.

(4) "Refining" is the process by which crude oil, distillate and condensate are separated or fractionated into the various component parts or purified.

(5) "Storage" means and includes any keeping or retention in this state of oil and natural gas.

(6) "Measurement" is any process by which the volume of natural gas affected by this Part is determined.

(7) "Sale" is the transfer of ownership of and title to natural gas from one person to another for valuable consideration.

(8) "Use" is: the sale; the transportation in the state to the point of delivery at the inlet of any processing plant; the transportation in the state of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; transfer of possession or relinquishment of control at a delivery point in the state; processing for the extraction of liquefiable component products or waste materials; use in manufacturing; treatment; or other ascertainable action at a point within the state.

(9) "Owner" is the person or person having title to and the right to alienate the natural gas subject to the tax at the time a use occurs in the state. It shall not include any person to whom temporary possession or control has been transferred1 In the event of a sale the purchaser shall be deemed the owner.

§ 1303. Imposition; exclusions; commingling

A. Pursuant to the exercise of the police and taxing powers of the state for the purpose of preventing economic and physical waste of our natural resources and for protecting and providing compensation for adverse effects upon the state's shorelands, waterbottoms and barrier islands, there is hereby levied and imposed a tax upon the first occurrence within this state of any use, as defined in this Part, of any natural gas upon which no severance tax or tax upon the volume of production has been paid, or is legally due to be paid, to this state or any other state or territory of the United States, or which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country. The tax levied herein shall not apply to natural gas otherwise subject thereto when such gas is used or consumed in the drilling for or production of oil, natural gas, sulphur, or in the processing of natural gas for liquids extraction within the state; nor shall it apply to gas shrinkage volumes attributable to the extraction of ethane, propane, butanes, natural or casinghead gasoline or other liquefied hydrocarbons, provided shrinkage volumes shall not exceed equivalent gas volumes of the extract-

ed liquids computed by recognized conversion factors used by the Gas Processors Association nor shall it apply to natural gas used or consumed in the manufacture of fertilizer and anhydrous ammonia within the state.

B. The tax imposed by Subsection A of this Section shall be computed at a rate of seven cents on each unit of natural gas as to which a use first occurs within the state. For the purposes of this tax a unit shall be one thousand cubic feet of natural gas as measured at a pressure base of 15.025 pounds per square inch absolute and at a temperature base of sixty degrees Fahrenheit.

C. In furtherance of the public policy and purpose set forth in Section 1301 of this part, and particularly Subsection C of said Section, this tax shall be deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas. Any agreement or contract by which an owner of natural gas at the time a taxable use first occurs claims a right to reimbursement or refund of such taxes from any other party in interest, other than a purchaser of such natural gas, is hereby declared to be against public policy and unenforceable to that extent. Notwithstanding any such agreement or contract, such an owner shall not have an enforceable right to any reimbursement or refund on the basis that this tax constitutes a cost incurred by such owner by virtue of the separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, or that this tax constitutes any other grounds for reimbursement or refund under such agreement or contract, unless there has been a final and unappealable judicial determination that such owner is entitled to such reimbursement or refund, notwithstanding the public policy and purpose of this part and the foregoing provisions of this Subsection C. In any legal action pursuant to this Subsection, the state shall be an indispensable party in interest.

D. When natural gas subject to the tax levied in this Part is commingled with oil and/or natural gas not

subject to the tax levied herein, it shall be presumed that the volumes withdrawn from the commingled mass by the first use shall be in the same ratio as the ratio of the resources entering the commingled mass.

E. Nothing in this Part shall be construed as imposing any tax on the production, severance, or ownership of natural gas produced outside of the boundaries of the state of Louisiana, it being the intention of this Part that the incidence of this tax shall not be upon the natural gas nor upon the property or rights from which it is produced, but rather shall be only upon the privilege of performance or allowing the performance, by the owner, of the enumerated actions comprising first use within the state.

F. If any use as defined in this Part and first occurring is determined not to be a constitutionally taxable incident, the tax shall be imposed upon the use first occurring thereafter.

§ 1304. Authority of the collector of revenue to promulgate rules and regulations

The collector of revenue is authorized to promulgate rules and regulations necessary to effect the intent and purpose of this Part, including regulations concerning the measurement of products associated with the incidents taxed herein.

§ 1305. Reports and payments; reimbursement limitations

A. The owner or owners of the natural gas at the time a use first occurs in this state shall file with the Department of Revenue and Taxation on or before the last day of each month following the month of first use, statements on forms procured from the department, showing the volumes, values, owners and such other information as the department may require by law or regulation for computing and assessing the amount of tax due under this Part.

B. The taxes levied by this Part shall be due and payable to the Department of Revenue and Taxation

monthly on or before the last day of the month following the month to which the tax is applicable by the owner or owners of the natural gas stream at the time any use, as defined herein, first occurs within the state.

§ 1306. Delinquent tax; failure to report or pay

A. The tax provided by this Part shall become delinquent after the date fixed for each monthly report to be filed in the office of the collector, and from such time shall be subject to the addition of interest, penalties, and costs as provided in Chapter 18, Subtitle II of this Title.

B. The failure to report or pay, within ninety days, in the manner and at the time required herein, the tax imposed by this Part on the first use of natural gas is unlawful, and the natural gas shall be deemed illegal gas subject to the provisions of R.S. 30:19 and, as such, shall be treated as contraband and shall be seized and sold as provided by R.S. 30:20.

§ 1307. Disposition of collections

The secretary shall remit all collections of taxes provided by this Part each month to the state treasurer, not later than the tenth day of the month following the month in which collections are made. The state treasurer shall credit all such collections to the state treasury.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

This Act shall become effective immediately upon signature by the governor and the adoption by the legislature of House Bill 140 of the 1978 Regular Session; provided however that taxes shall not begin to accrue on natural gas subject to the tax levied by this Part until 7:00 A.M. on April 1, 1979.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

Section 4. Notwithstanding the provisions of Section 2 of this Act, in the event that a final and unappealable judicial decision is rendered upholding the right of an owner to enforce a contract or agreement otherwise rendered unenforceable by R.S. 47:1303(C) of this Act, the following consequences shall ensue:

(1) If the right upheld arises from the provisions of a contract or agreement requiring any other party to reimburse or refund to an owner taxes incurred by such owner by virtue of the separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, then the tax levied in this Act shall not be due in respect to natural gas previously and thereafter sold pursuant to any contract or agreement containing such requirement, and the secretary of the Department of Revenue and Taxation shall forthwith return to each taxpayer all taxes previously paid in respect to such natural gas, together with interest at the rate of six percent per annum from the date the taxes were paid; or

(2) If the right upheld arises from the provisions of a contract or agreement requiring any other party to reimburse or refund to an owner costs or expenses incurred by such owner by virtue of separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, then this Act shall be null and void and the secretary shall forthwith return to each taxpayer all taxes previously paid, together with interest at the rate of six percent per annum from the date of payment.

All taxpayers receiving refunds and interest pursuant to this Section shall in turn remit such refunds and interest to all other parties from whom they have received payments pursuant to the aforesaid provisions of such contracts.

Approved July 6, 1978.

EXHIBIT B

First Use Tax On Natural Gas — Severance Tax Credit

ACT NO. 436

HOUSE BILL NO. 1187

An Act to amend Chapter 6 of Title 47 of the Louisiana Revised Statutes of 1950 by adding thereto a new Part I-B, to be comprised of R.S. 47:647; to provide a severance tax credit to persons liable for the payment of the first use tax levied in R.S. 47:1301 through R.S. 47:1307; to provide for the amount of the tax credit; to provide for parish allocations; to provide for regulations; and otherwise to provide with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. Part 1-B of Chapter 6 of Title 47 of the Louisiana Revised Statutes of 1950, consisting of R.S. 47:647 is hereby enacted to read as follows:

Part I-B. Severance Tax Credit

§ 647. Severance tax credit.

A. Every taxpayer liable for and remitting taxes levied and collected pursuant to R.S. 47:1301 through 1307 and each taxpayer who bears such taxes as a direct result of contractual terms or agreements applied in disregard of R.S. 47:1303C, shall be allowed a direct tax credit, at any time following payment of such tax, but, not in excess of the amount which must be borne by such taxpayer, against severance taxes owed by such taxpayer to the state, the amount of which credit shall not exceed the amount of severance taxes for which such taxpayer is liable to the state as a direct consequence of the privilege of severing natural resources from the surface of the soil or water of the state. A taxpayer who bears any portion of the tax levied pursuant to R.S. 47:1301 through 1307 as a direct result of contractual terms or agreements applied in disregard of R.S. 47:1303C, shall be entitled to a credit under this Section only after there has been a

determination by the Louisiana Supreme Court or the appropriate United States District Court that such taxpayer must bear the tax, provided that if the taxpayer or the state has sought and been denied a preliminary injunction enjoining the application of such contractual terms or agreements sought to be rendered inapplicable by R.S. 47:1303(C), then such taxpayer shall be entitled to a credit under this Section from the date of denial of the preliminary injunction.

B. No tax credit pursuant to this Section shall be allowed for any taxes remitted pursuant to R.S. 47:1301 through 1307 for which a taxpayer has an enforceable right to reimbursement from a third party. A taxpayer claiming any credit under this Section shall furnish to the secretary of the Department of Revenue and Taxation all applicable contracts and other information requested by the secretary, which relate to such taxpayer's possible right to reimbursement. If the secretary determines that the taxpayer has an enforceable right to reimbursement, which the taxpayer is not actually receiving, the secretary shall so rule. Within thirty days of receipt of notice of such ruling the taxpayer shall have the right to appeal such ruling to the Louisiana Board of Tax Appeals which board shall determine in open meeting whether there is sufficient evidence to support the ruling of the secretary. If the board determines that there is not sufficient evidence it shall overrule the secretary and the taxpayer shall not be required to take any other action in order to receive the tax credit provided by this Section. If the board determines that there is sufficient evidence, the taxpayer shall thereafter have a period of ninety days within which to institute any administrative or judicial proceedings necessary to assert such right to reimbursement. The taxpayer shall pursue such administrative or judicial proceedings with due diligence. At all times prior to commencement of such administrative or judicial proceedings and during the pendency thereof, and during any appeals therefrom, the taxpayer shall continue to be entitled to the credit provided in this

Section; provided that if no action is taken by the taxpayer to assert the right to reimbursement within ninety days no further credit shall be granted and the state shall have the right to recover from the taxpayer any credits granted prior to the expiration of such time. If it is determined in any administrative proceedings that a taxpayer has no right to such reimbursement, then the taxpayer shall not be entitled to continue receiving the credit allowed by this Section, unless the taxpayer within the time allowed by applicable law seeks judicial review of such administrative determination and pursues such judicial review to a final and unappealable judgment. If the administrative or judicial determination establishes that the taxpayer has an enforceable right to reimbursement of the taxes levied pursuant to R.S. 47:1301 through 1307, and if the taxpayer is so reimbursed, then such taxpayer shall be liable to the state for additional severance taxes equivalent to the amount of taxes levied under R.S. 47:1301 through 1307 for which such taxpayer has received reimbursement. The taxpayer shall also pay to the state interest on such taxes at the rate prescribed in R.S. 47:1601, accruing from the date on which the credit attributable to such taxes was taken to the date of final payment but only to the extent of any interest which the taxpayer has itself received on the amount of reimbursement.

C. The credit allowed by this Section shall not affect the percentage allocation of severance tax proceeds otherwise due to any parish, and the secretary of the Department of Revenue and Taxation, with the concurrence of the state treasurer shall, by regulation, establish such procedures as may be deemed necessary to provide therefor.

D. The secretary of the Department of Revenue and Taxation shall promulgate rules and regulations necessary for the implementation and administration of the tax credit provided for herein.

Section 2. Notwithstanding the provisions of R.S. 47:1351, the treasurer shall, after any funds have first been deposited to the credit of the Bond Security and Redemption Fund, pay into the general fund, from the total proceeds of the first use tax authorized by R.S. 47:1301 through 1307, such amounts as are necessary to fully reimburse said general fund for tax credits granted pursuant to this Act.

Section 3. Tax credits authorized by this Act shall not be granted until there has been a final decision upholding the validity of the first use tax authorized and levied pursuant to R.S. 47:1301 through 1307, except to the extent that taxes levied pursuant to said Part are collected without either protest or suit for recovery filed directly by the person claiming the credit. In the event that tax credits authorized under this Act are granted, the recipient thereof shall be deemed to have waived his right to recovery of any taxes paid and collected pursuant to R.S. 47:1301 through 1307 to the extent of the tax credit granted.

Section 4. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

Section 5. All laws or parts of laws in conflict herewith are hereby repealed.

Section 6. The provisions of this Act shall become effective upon the enactment into law of House Bill 768 of the 1978 Regular Session of the Louisiana Legislature.

Approved July 10, 1978.

Supreme Court, U. S.
FILED
MAR 29 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

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STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. , Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

JURISDICTION

By this action Maryland, Illinois, Indiana, Massachusetts, Michigan, New York, Rhode Island, and Wisconsin challenge the constitutionality of the Louisiana First Use Tax on natural gas passing through Louisiana in transit to other states.

This controversy between the plaintiff states and the State of Louisiana is within the original and exclusive jurisdiction of this Court under article III, section 2, clauses 1 and 2 of the Constitution of the United States and 62 Stat. 927, Title 28, United States Code, Section 1251(a)(1) (1976).

QUESTION PRESENTED

Whether a challenge by plaintiff states to the constitutionality of the Louisiana First Use Tax, imposed on natural gas entering into and passing through Louisiana while in transit to other states, presents an appropriate case for this Court's exercise of its exclusive, original jurisdiction, where plaintiffs present facts which establish that:

I. The First Use Tax constitutes an unconstitutional, discriminatory burden upon interstate commerce.

II. The First Use Tax violates the supremacy clause of the United States Constitution.

III. The First Use Tax is an unconstitutional impost or duty on imports.

IV. The First Use Tax unconstitutionally impairs the obligation of contracts.

V. The First Use Tax denies equal protection of the laws.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Article I, section 8, clause 3 of the Constitution of the United States provides as follows:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.

Article VI, clause 2 of the Constitution of the United States provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in

> the Constitution or Laws of any State to the Contrary notwithstanding.

Article I, section 10, clause 2 of the Constitution of the United States provides as follows:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

Article I, section 10, clause 1 of the Constitution of the United States provides as follows:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .

Section 1 of the fourteenth amendment to the Constitution of the United States provides as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The First Use Tax on Natural Gas, Act No. 294, 1978 La. Sess. Law Serv. 482 (West) (to be codified as LA. REV. STAT. ANN. §§ 47:1301-1307), is set out in full in Exhibit A to the accompanying Complaint, pp. 1a-8a.

The First Use Tax on Natural Gas — Severance Tax Credit, Act No. 436, 1978 La. Sess. Law Serv. 842 (West) (to be codified as LA. REV. STAT. ANN. § 47:647), is set out in full in Exhibit B to the accompanying Complaint, pp. 9a-12a.

The First Use Tax Trust Fund, Act No. 293, 1978 La. Sess. Law Serv. 480 (West) (to be codified as LA. REV.

STAT. ANN. § 47:1351), is set out in full in the Appendix to this brief, pp. 1a-4a., *infra.*

STATEMENT

The purpose of this suit is to set aside, on constitutional grounds, Louisana's First Use Tax on Natural Gas (hereinafter referred to as "First Use Tax").[1]

Effective April 1, 1979, the State of Louisiana intends to impose a First Use Tax at a rate of seven cents per thousand cubic feet ("Mcf") upon the first occurrence of any "use"[2] of natural gas within Louisiana, providing that such gas is not otherwise subject to a severance, production or import tax levied by any state, territory or by the United States. Since Louisiana imposes a severance tax upon all intrastate production,[3] the incidence of the First Use Tax is solely upon natural gas produced outside Louisiana, which, for practical purposes, means natural gas produced outside the territorial limits of the United States, from acreage controlled by the Federal Government.

The alleged purpose of the tax is to compensate Louisiana for damage to its waterbottoms, barrier reefs, and shorelines. § 47:1301. Contractual provisions that would place responsibility for state taxes on the producers of natural gas are declared to be "against public policy and unenforceable to that extent."

[1] First Use Tax on Natural Gas, Act No. 294, 1978 La. Sess. Law Serv. 482 (West) (to be codified as LA. REV. STAT. ANN. §§ 47:1301-1307). A copy of the First Use Tax is attached to the Complaint as Exhibit A.

[2] Under the Act "use" includes, among other activities, the sale, transportation or processing of natural gas, § 47:1302(8), but it does not include "natural gas used or consumed in the manufacture of fertilizer and anhydrous ammonia within the state." § 47:1303A.

[3] LA. REV. STAT. ANN. §§ 47:631-646 (West 1970 and Supp. 1978.) The severance tax on intrastate production of natural gas is also set at seven cents per Mcf. § 47:633(9) (Supp. 1978).

§ 47:1303C. Contemporaneous with the passage of the First Use Tax, the Louisiana legislature enacted a severance tax credit[4] which permits in-state producers liable for the First Use Tax to credit that liability, dollar-for-dollar, against their severance tax liability.

The First Use Tax will be levied against substantial quantities of natural gas produced from the Outer Continental Shelf ("OCS"), a domain under the control of the Federal Government outside the seaward boundaries of the State of Louisiana.[5] Gas from this federally-controlled domain is transported through Louisiana by interstate pipelines.[6]

The Federal Energy Regulatory Commission ("FERC"), through the adoption of an automatic tracking mechanism,[7] has provided a procedure for

[4] First Use Tax on Natural Gas — Severance Tax Credit, Act No. 436, 1978 La. Sess. Law. Serv. 842 (West) (to be codified as LA. REV. STAT. ANN. § 47:647). A copy of the First Use Tax on Natural Gas — Severance Tax Credit is attached to the Complaint as Exhibit B.

[5] The Outer Continental Shelf is defined and delineated in the Outer Continental Shelf Lands Act, 67 Stat. 462-70, 43 U.S.C. §§ 1331-1343 (1976). The Submerged Lands Act, 67 Stat. 29-32, 43 U.S.C. §§ 1301-1315 (1976), passed several months earlier in 1953, draws the line of demarcation between state and federal domains.

[6] Each of these pipelines is a "natural gas company" as defined in section 2 of the Natural Gas Act, 52 Stat. 821, 15 U.S.C. § 717a(6) (1976), and is regulated by the Federal Energy Regulatory Commission ("FERC") as successor to the Federal Power Commission. As part of the Natural Gas Act's comprehensive regulatory scheme, the purchase of natural gas from producers, its transportation in interstate commerce, and its sale to distribution companies must be made pursuant either to certificates of public convenience and necessity or rate schedules or tariffs issued or approved by FERC.

[7] State of Louisiana First Use Tax in Pipeline Rate Cases, Docket No. RM 78-23, Order No. 10, "Order Establishing Procedures Governing Pipeline Recovery of the State of Louisiana First Use Tax," issued August 28, 1978, 43 Fed.

consumer reimbursement of any First Use Tax payments by pipelines. Although those charges are to be collected subject to refund, pending a final judicial determination of the constitutionality of the tax, the immediate burden and incidence of the tax will be passed directly to the ultimate consumers.

Based on the volumes of natural gas entering Louisiana from the OCS in 1977, it has been estimated by FERC that the First Use Tax will be imposed on approximately 3,190 million Mcf[8] resulting in the imposition of a 225 million dollars per annum charge on consumers.

Each of the eight plaintiff states is a significant consumer of natural gas, and each plaintiff state and its citizens will be substantially harmed by the First Use Tax and will suffer economic burdens and hardships.

Reg. 45,553 (Oct. 3, 1978); Order No. 10-A, "Order on Rehearing, Modifying Prior Order, Amending Regulation and Requesting Comment," issued December 20, 1978, 43 Fed. Reg. 60,438 (Dec. 28, 1978), *appeal docketed,* Tennessee Gas Pipe Line Co. v. Fed. Energy Regulatory Comm'n, No. 78-38-13, et al. (5th Cir. Dec. 26, 1978); and Order No. 10-B, "Order on Rehearing, Modifying Prior Order and Amending Regulations," issued March 2, 1979, 44 Fed. Reg. 13,460 (Mar. 12, 1979).

[8] This estimate is based on total OCS production entering Louisiana in 1977 of 3,647, 513, 674 Mcf, less 220 million Mcf in shrinkage during processing, 100 million Mcf reserved for the producer's own use or direct industrial sales, and 140 million Mcf consumed in the production of fertilizer and anhydrous ammonia in Louisiana. See Complaint, paragraph 14, Fed. Energy Regulatory Comm'n v. McNamara, Civil Action No. 78-384 (M.D. La., filed Sept. 29, 1978). The First Use Tax will also be imposed upon all volumes of natural gas that may be imported from foreign countries without severance taxes and imported through Louisiana.

SUMMARY OF ARGUMENT

I. Plaintiff States Have Standing To Challenge The Louisiana First Use Tax.

Plaintiff states are suing both in their proprietary capacities and as *parens patriae*. In their proprietary capacities, plaintiff states are themselves major consumers of natural gas subject to the First Use Tax and will be directly injured by that tax. A state may sue in its proprietary capacity. *Maryland v. Wirtz*, 392 U.S. 183 (1968). This Court is the only federal forum in which plaintiffs can assert their claim. 62 Stat. 927, 28 U.S.C. § 1251(a)(1) (1976).

Plaintiff states also sue as *parens patriae* to prevent the substantial harm that the First Use Tax would cause to the health and welfare of their citizens and to the economic vitality of the commercial activities of those citizens. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945).

The decision in *Arizona v. New Mexico*, 425 U.S. 794 (1976), in which this Court declined to accept an original action by Arizona challenging the constitutionality of an electrical energy tax imposed by New Mexico on utilities that retailed to Arizona customers, should not bar the filing of this case.

First, Arizona did not allege and did not face immediate harm from the challenged tax, because the Arizona utilities had refused to pay the tax and had challenged it judicially. In this case, however, the pipeline companies must pay the First Use Tax even before its constitutionality has been determined, and have been granted the right by FERC immediately to pass that cost on to consumers. Thus, the First Use Tax will have an immediate, direct impact on the rates paid for natural gas by plaintiff states and their citizens.

Second, whereas in *Arizona v. New Mexico* a subdivision of Arizona had joined in a pending New Mexico state court challenge to the tax, none of the plaintiff states or their subdivisions are parties to any pending judicial challenge to the First Use Tax. Neither the declaratory judgment action filed by the State of Louisiana in state court nor an action brought by FERC in federal district court and stayed pending the outcome of the state court litigation represent appropriate actions in which the plaintiffs can litigate their claim. The proper forum, under the Constitution, is the Supreme Court of the United States.

Third, this case raises issues of national significance and federal law — including the conflict between the First Use Tax and federal energy regulation — that were not raised by Arizona's challenge to the New Mexico electrical energy tax.

Finally, this case, unlike *Arizona v. New Mexico,* involves a challenge by a cross section of states that represent multiple regions of the country to the collection of hundreds of million dollars annually by a single state hundreds of miles away. If Louisiana is allowed to impose its First Use Tax upon natural gas in interstate commerce, other states could race to impose countervailing measures on comparable products and our national economy would regress into the precise interstate feudalism that our Constitution and our federal system were designed to prevent.

II. The Louisiana First Use Tax Raises Important And Substantial Federal Questions And Is In Conflict With Applicable Decisions Of This Court.

The First Use Tax offends multiple provisions of the United States Constitution:

A. The First Use Tax unconstitutionally burdens interstate commerce. The First Use Tax is applied to natural gas from a federal domain, and not to activities with a substantial nexus to Louisiana; it is not fairly apportioned; it discriminates against interstate commerce; and it is not fairly related to services provided by Louisiana. *Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734 (1978).

The flow of natural gas in pipelines from and to points outside the state constitutes interstate commerce, *East Ohio Gas Co. v. Tax Commission of Ohio,* 283 U.S. 465 (1931), which a state may not tax. *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954).

The "uses" taxed by Louisiana are not "separate local activities" that may permissibly be taxed. Nor do such uses as transportation or transfer or sale establish a sufficient nexus to Louisiana to justify the tax.

The First Use Tax is not fairly apportioned. It is not related to investment, receipts, or other indicia of a nexus with Louisiana. The tax exposes both natural gas from the OCS and imported natural gas to the burden of multiple taxation by other states through which the same gas would pass. *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450 (1959); *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954).

The First Use Tax discriminates against interstate commerce in several respects. First, it taxes OCS gas moving through Louisiana but does not tax gas produced in Louisiana (including gas produced from that part of offshore Louisiana that remains under state control) or gas produced in states that impose severance taxes, even though such gas enjoys the same protections, and causes the same alleged damages, as OCS gas. Second, the Louisiana Severance Tax Credit

permits taxpayers to credit their First Use Tax liability against their liability for Louisiana's severance tax, thereby favoring pipelines that produce natural resources subject to the severance tax and burdening those that do not. Third, natural gas consumed in specified uses, such as production of sulphur, fertilizer, and anhydrous ammonia, is exempt from the First Use Tax if those activities occur in Louisiana, but not if they occur in other states.

The First Use Tax is not fairly related to services provided by Louisiana. The size of the tax, which will return more than $225,000,000 annually to the State of Louisiana, is utterly disproportionate to the minimal burdens which the taxed activity places upon the state or to the minimal privileges afforded by the state. Although the First Use Tax and Severance Tax have been set at equivalent rates, the latter is intended to compensate Louisiana for loss of its natural resources, a loss not caused by the "use" of OCS gas. The excessiveness of the First Use Tax is also shown by the limited proportion of the revenues collected that are earmarked for the statutory purpose of protecting the environment, by the collection of other taxes from the same taxpayers, and by the availability under the Coastal Zone Management Act of federal grants to compensate states harmed by OCS development.

B. The First Use Tax violates the supremacy clause. The Natural Gas Act, the Natural Gas Policy Act, and the Outer Continental Shelf Lands Act constitute a comprehensive and preemptive program for the regulation of natural gas.

More specifically, the First Use Tax, by voiding contractual provisions requiring reimbursement of the tax by producers, conflicts with numerous certificates of public convenience and necessity issued by FERC that incorporate the terms of underlying contracts contain-

ing reimbursement provisions. The First Use Tax conflicts with the requirement in the Outer Continental Shelf Lands Act that state taxation laws shall not apply to the OCS.

C. The First Use Tax is an unconstitutional impost or duty on imports. The tax on its face applies to imports and is imposed before the "original package" is broken and before the gas loses its status as an import. *East Ohio Gas Co. v. Tax Commission of Ohio,* 283 U.S. 465 (1931). The First Use Tax would create a special preference for domestic goods and conflict with the federal government's foreign trade policy. *Michelin Tire Corp. v. Wages,* 423 U.S. 276 (1976). It could seriously inhibit the importation of natural gas from Canada and Mexico. And the tax would disturb harmony among the states. *Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734 (1978).

D. The First Use Tax impairs the obligation of contracts by nullifying provisions requiring producers to reimburse pipeline companies for the tax. This nullification clause serves no legitimate end, either by raising added revenue or by protecting Louisiana's environment. *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398 (1934). The nullification clause does not deal with a broad economic or social problem, does not cover an area already subject to state regulation, does not have merely a temporary impact, and is not aimed at a broad class of persons. *Allied Structure Steel Co. v. Spannaus,* ___ U.S. ___, 57 L. Ed. 2d 727 (1978).

E. The First Use Tax denies equal protection of the laws, because it establishes a classification treating taxpayers who are engaged solely in interstate OCS natural gas activity differently from taxpayers who are also engaged in in-state natural resource production.

ARGUMENT

I.

PLAINTIFF STATES HAVE STANDING TO CHALLENGE THE LOUISIANA FIRST USE TAX.

A. *Plaintiff States Have Standing In Their Proprietary Capacities To Challenge The Louisiana First Use Tax.*

Plaintiff states are major consumers of natural gas subject to the First Use Tax, including gas used for space and water heating in public buildings, and as such will be injured directly in their proprietary capacities. Plaintiffs estimate that the imposition of the First Use Tax will cost them at least 1.5 million dollars annually.

If, in addition, the direct incremental cost of the tax to the political subdivisions and educational institutions of plaintiff states is considered as well, the anticipated financial burden would be significantly greater. Injury to these subdivisions and educational institutions, as consumers, constitutes injury to the states themselves for purposes of this Court's original jurisdiction. *Arkansas v. Texas,* 346 U.S. 368, 370 (1953).

It is well established that a state may bring an action in its proprietary capacity, *Maryland v. Wirtz,* 392 U.S. 183 (1968); *Oklahoma v. United States Civil Service Commission,* 330 U.S. 127 (1947), and that this Court has jurisdiction over such an action when brought against a sister state. *North Dakota v. Minnesota,* 263 U.S. 365, 373-74 (1923); *Pennsylvania v. West Virginia,* 262 U.S. 553, 592 (1923). In the present instance this jurisdiction is exclusive, 62 Stat. 927, 28 U.S.C. § 1251(a)(1) (1976), and the plaintiff states have no federal forum other than this Court in which to assert their claim. *Illinois v. City of Milwaukee,* 406 U.S. 91, 93 (1972).

B. *Plaintiff States Have Standing To Challenge The Louisiana First Use Tax As Parens Patriae Of Their Citizens Who Are Consumers Of Natural Gas.*

The total direct economic cost of the First Use Tax on the citizens of plaintiff states will exceed 120 million dollars, excluding the multiplier effect on the economy generally, which should increase that burden significantly.

States may sue as *parens patriae* in an original action, *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-59 (1972), and this case presents an appropriate exercise of that doctrine. *See Pennsylvania v. West Virginia*, 262 U.S. 553, 591-92 (1923);[9] *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 447-51 (1945).[10] A principal

[9] In a suit to enjoin the enforcement of a West Virginia conservation statute threatening to cut off the supply of natural gas flowing from West Virginia fields, Pennsylvania was found to have standing, not only as a proprietor of public institutions which used the gas, but also "as the representative of the consuming public whose supply will be similarly affected." 262 U.S. at 591. Where matters of health, comfort and welfare are concerned, the state, "as the representative of the public, has an interest apart from that of the individuals affected." *Id.* at 592.

[10] This Court upheld the right of Georgia to bring an original suit as *parens patriae* to enforce the civil remedies of the antitrust laws, on an allegation that the economy of Georgia and the welfare of her citizens had suffered serious injury from a conspiracy of the defendant railroad companies. Addressing the issue of discriminatory rates, the Court compared the damages alleged in *Georgia* to those alleged in Pennsylvania v. West Virginia, *supra*, note 9, and other traditional original jurisdiction cases:

> If the allegations of the bill are taken as true, the economy of Georgia and the welfare of her citizens have seriously suffered as the result of this alleged conspiracy. Discriminatory rates are but one form of trade barriers. They may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a State as profoundly as any diversion of waters from the rivers. They may stifle, impede, or cripple old

objective of plaintiffs in bringing this suit is to avoid the direct and substantial harm that would be imposed on their citizens and on commercial activities by imposition of the discriminatory First Use Tax. The situation here is directly analogous to that which pertained in *Georgia v. Pennsylvania Railroad:* The First Use Tax would cause serious injury to the health and welfare of the citizens of plaintiff states and would threaten the viability of their gas-consuming industries. The tax would insidiously harm the economic prosperity of entire regions of the country.

C. *This Suit Is Not Barred By The Decision In Arizona v. New Mexico.*

This Court has original and exclusive jurisdiction over disputes between two or more states, and "it has a responsibility to exercise that jurisdiction when it is properly invoked." *California v. Texas,* ___ U.S. ___, 57 L. Ed. 2d 464, 467 (1978) (per curiam) (Stewart J., concurring opinion).

In *Arizona v. New Mexico,* 425 U.S. 794 (1976), this Court declined to accept an original action by Arizona challenging the constitutionality of New Mexico's electrical energy tax imposed on utilities that retailed to Arizona customers; this case, however, differs in several important respects and should not be governed by that decision.

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industries and prevent the establishment of new ones. They may arrest the development of a State or put it at a decided disadvantage in competitive markets. Such a charge at least equals in gravity the one which Pennsylvania and Ohio had with West Virginia over the curtailment of the flow of natural gas from the West Virginia fields.

324 U.S. at 450-51. The Court went on to affirm Georgia's standing to sue. In this action plaintiff states are in a similar position.

First, as Justice Stevens' concurring opinion in *Arizona v. New Mexico* pointed out, Arizona was "not sufficiently affected" by the challenged tax "to justify its invocation of the 'original and exclusive jurisdiction' of this Court," because Arizona had not alleged that the electrical energy tax had "some impact on the rates paid by consumers of electricity in Arizona." 425 U.S. at 798. Indeed, the refusal of the Arizona utilities to pay the New Mexico tax protected Arizona and its citizens from any injury pending resolution of the challenges to the tax. That is not the situation here, however. Because FERC has allowed the pipelines to pay the First Use Tax to Louisiana (under protest) and to collect and escrow the tax from their customers, the First Use Tax will have an immediate impact on the rates paid by consumers of natural gas who are citizens of the plaintiff states, as well as on the rates paid by plaintiff states for their own consumption. Thus plaintiff states will begin to suffer injury on April 1, 1979, even while judicial challenges to the tax are pending.

Second, none of the plaintiff states, and none of their political subdivisions, are parties to any pending suit in any other jurisdiction. In *Arizona* v. *New Mexico,* a political subdivision of Arizona had joined a challenge to the tax in a New Mexico state court. Two actions concerned with the constitutionality of the First Use Tax have been filed in Louisiana, but neither represents an appropriate vehicle either for participation by plaintiffs or for ultimate review by this Court. The first suit, a self-seeking action filed in Louisiana state court by the State of Louisiana,[11] seeks a declaratory judgment that the First Use Tax is constitutional. Not only is it inappropriate for plaintiff states to be required to litigate their claim in the state court system of the

[11] Edwin W. Edwards v. Transcontinental Gas Pipe Line Corp., No. 216867 (19th Judicial District Court, La., filed Sept. 22, 1978).

defendant state, but that action is a request for an advisory opinion and does not present a case or controversy that would be reviewable by this Court.[12] The second suit, brought by FERC in federal district court,[13] has been stayed pending the outcome of the state court litigation.[14] Moreover, intervention by plaintiff states in that action would divest the district court of jurisdiction.[15] Thus, plaintiff states — unlike Arizona — have no adequate alternative forum.

Third, this Complaint raises issues of national significance and federal law not raised by Arizona's challenge to the New Mexico electrical energy tax. For

[12] An action by state officials to have a state statute declared constitutional is not maintainable in the Louisiana courts. Louisiana v. Bd. of Supervisors, 228 La. 951, 84 So. 2d 597 (1955). Furthermore, because Louisiana law prohibits state courts from granting relief to defendant taxpayers, LA. REV. STAT. ANN. § 47:1575 (1975), the existing state case, even if maintained, will result in a decree that is advisory in nature and not reviewable by this Court. Muskrat v. United States, 219 U.S. 346, 361-63 (1911). Whether or not a state court is empowered to render advisory opinions, this Court may not review a state court proceeding that does not present an article III case or controversy, Doremus v. Board of Education of Hawthorne, 342 U.S. 429, 434 (1952).

[13] Fed. Energy Regulatory Comm'n v. McNamara, Civil Action No. 78-384 (M.D. La., filed Sept. 29, 1978).

[14] *Id.*, Order of Judge West, Jan. 26, 1979, *appeal docketed*, Fed. Energy Regulatory Comm'n v. McNamara, No. 79-1403 (5th Cir. 1979). Three of the plaintiff states filed an application in that case for *amicus curiae* status and for inclusion on the service list, but that application had not been ruled on at the time the action was stayed.

[15] *See* State Water Control Bd. v. Washington Suburban Sanitary Comm'n, 61 F.R.D. 588 (D.D.C. 1974) (intervention by Maryland would convert action to a suit between two states and thereby destroy district court's jurisdiction). Note also that the tax-injunction statute, 62 Stat. 932, 28 U.S.C. § 1341 (1976), would bar the federal district court from enjoining collection of the First Use Tax on behalf of the plaintiff states, although it would not bar an injunction on behalf of FERC.

example, the First Use Tax burdens *federal* OCS gas, not merely the intrastate generation of electrical energy. As such it conflicts with a broad federal regulatory scheme set forth in the Natural Gas Act and the Federal Energy Regulatory Commission's implementing regulations. Indeed, the historic compromise between the Federal Government and the states, and the entire legislative system for the control of the "tidelands" — defining which areas are under a seaboard state's control and which areas, farther at sea, are under federal control — would be set at naught by the devices Louisiana seeks to employ. New Mexico's electrical energy tax did not conflict with any similar federally preempted area of the law. In addition, as is alleged in the Complaint, the First Use Tax would impose a burden upon imported natural gas that would seriously affect this nation's foreign trade and foreign relations and violate the import-export clause of the Constitution.

Fourth, this case does not present a simple dispute between two neighboring states; rather, it involves the imposition by a single state of a burdensome tax upon more than half the states in the nation. Plaintiffs in this action are a diverse cross section of states, representing multiple regions of the country. Hundreds of millions of dollars will change hands each year if the First Use Tax is not enjoined. Plaintiffs and their citizens should not be required to pay these vast sums of money[16] while this case wends its way through the

[16] It is well established that "the possibility of refund[s] does not afford [consumers] sufficient protection [from illegal rates.]" Fed. Power Comm'n v. Hunt, 376 U.S. 515, 524 (1964). In addition to the irreparable damage to the economies of plaintiff states that would be triggered by price rises to natural gas consumers, "the trickling down process necessary to be followed, the incidental cost of which is often borne by the consumer, and . . . the transient nature of our society . . . often prevents refunds from reaching those to whom they are due." Fed. Power Comm'n v. Tennessee Gas Transmis-

Louisiana state court system,[17] when the Constitution provides the plaintiffs with an immediate, exclusive access to a decision in this Court.

Finally, this action is in a very real sense a test case critical to the nation's economic health. If Louisiana is allowed to impose its First Use Tax upon natural gas in interstate commerce, legislatures in other seaboard states will be encouraged to race to impose countervailing measures on imported natural gas, oil, and other products, and landbound states will seek to tax comparable products while in transit within their borders. At a time when our domestic economic health cries out for inflationary restraint, and the energy crisis cries out for a consistent, rational, federal energy policy, this Court should stand as a guardian against balkanization of the states, destructive internecine warfare, and an unfortunate descent into the very interstate feudalism the Constitution was designed to prevent.

II.

THE LOUISIANA FIRST USE TAX RAISES IMPORTANT AND SUBSTANTIAL FEDERAL QUESTIONS AND IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

This case raises substantial federal questions. Plaintiffs argue that the Louisiana First Use Tax, with an

sion Co., 371 U.S. 145, 154-55 (1962) (footnote omitted). Moreover, the six percent interest provided in the escrow provisions of LA. REV. STAT. ANN. § 47:1576A (West Supp. 1978) will not adequately compensate the interstate pipelines for the use of their money, a cost that may ultimately be borne by consumers in the event it is found by FERC to be just and reasonable under the Natural Gas Act.

[17] Moreover, this action is not likely to raise many, if any, disputed factual issues, making this Court's original jurisdiction particularly appropriate. Nor is there any possibility that a narrowing statutory interpretation of the First Use Tax by a state court would preserve the First Use Tax from constitutional attack, a possibility that might otherwise support abstention by this Court.

annual impact on natural gas consumers in the hundreds of millions of dollars, offends multiple provisions of the United States Constitution.

A. *The Louisiana First Use Tax Constitutes An Unconstitutional And Discriminatory Burden Upon Interstate Commerce.*

The grant of power to the Congress contained in the commerce clause also constitutes a withdrawal of power from the states, *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318, 328 (1977), and the constitutionality of a state tax on interstate commerce depends upon its "practical effect." *Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734, 750 (1978). Taxes will be sustained "that are applied to activity with substantial nexus with the State, that are fairly apportioned, that do not discriminate against interstate commerce, and that are fairly related to the services provided by the State." *Id.* The Louisiana First Use Tax — which is designed to be, and unquestionably is, a tax upon interstate commerce — fails all four tests.

1. *The Louisiana First Use Tax Is A Tax On Interstate Commerce.*

In measuring the validity of a state tax against the commerce clause, the threshold question to be answered is, Does the tax reach interstate commerce? The First Use Tax clearly does. The flow of natural gas in pipelines to points outside the state constitutes interstate commerce. *United Fuel Gas Co. v. Hallanan,* 257 U.S. 277 (1921). Indeed, the transmission of natural gas by high pressure pipelines is a national, not local, activity, and constitutes interstate commerce whether within or without the state. *East Ohio Gas Co. v. Tax Commission of Ohio,* 283 U.S. 465, 470 (1931). Only when natural gas passes into low pressure distribution

lines is the "original package" broken and the gas becomes a part of local rather than interstate commerce. *Id.* at 470-71.

A state may not directly tax the flow of natural gas in interstate commerce. In *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954), the Court held that a state tax on gathering could not survive the commerce clause test:

> [A]s a basis for finding a separate local activity, the incidence must be a more substantial economic factor than the movement of the gas from a local outlet of one owner into the connecting interstate pipeline of another.

347 U.S. at 169.

More than three billion Mcf of natural gas from the OCS enters Louisiana annually and is resold in interstate commerce. The movement of this gas through Louisiana is continuous and unbroken to the Louisiana border. The gas remains at high pressure while inside Louisiana.

The "uses" taxed by the First Use Tax are not "separate local activities" that may permissibly be taxed. The sale of the gas, or transfer of possession, control, or title, does not take the gas out of interstate commerce. *East Ohio Gas Co. v. Tax Commission of Ohio,* 283 U.S. 465 (1931). *Accord, Illinois Natural Gas Co. v. Central Illinois Public Service Co.,* 314 U.S. 498, 503-04 (1942). Nor may the tax be levied upon the transportation of the gas, or upon "other ascertainable action." Since the gas has not passed into the distribution system for delivery to consumers, it may not be taxed by the state.

2. *The Louisiana First Use Tax Is Applied On Certain Activities That Do Not Have A Sufficient Nexus With Louisiana.*

Many of the uses included in section 47:1302(8) are not activities with a sufficient nexus to the State of Louisiana to justify imposition of that state's taxing authority. A sufficient nexus is not established by transportation to the inlet of a processing plant,[18] or to the inlet of any measurement or storage facility,[19] or by transfer of possession or relinquishment of control at a delivery point in Louisiana.[20] And the basket category, "other ascertainable action at a point within [Louisiana]," is too vague to satisfy the constitutional nexus test.

3. *The Louisiana First Use Tax Is Not Fairly Apportioned.*

Contrary to the requirement of *Department of Revenue of Washington,* the First Use Tax is not fairly apportioned. It is not related to the taxpayer's investment in facilities, actual business activities, gross receipts, payroll, or other indicia of a concrete nexus with Louisiana.[21] The tax is a tax on the gas, not on local activities.

The First Use Tax is also unconstitutional because it exposes gas from the federally-controlled OCS and imported natural gas to the burden of multiple taxation. *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 458 (1959). If Louisiana is permitted

[18] Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954).

[19] State Tax Comm'n of Mississippi v. Interstate Natural Gas Co., 284 U.S. 41 (1931).

[20] Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954).

[21] *Cf.* Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 88 (1948) (tax properly apportioned to investment in state).

to impose this tax, every subsequent state will be invited to tax the volume of gas passing through its territory. In *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 170 (1954), this Court held a tax on "gathering gas" unconstitutional for just this reason. There the taxable incidence was the taking of natural gas from the outlet of a processing plant, an activity similar in nature to several of the "uses" that trigger imposition of the First Use Tax. And many or all of the "uses" taxed by Louisiana recur in other states through which the same gas would pass.[22]

4. *The Louisiana First Use Tax Discriminates Against Interstate Commerce.*

The third test is that a state tax not discriminate, "either by providing a direct commercial advantage to local business, . . . or by subjecting interstate commerce to the burden of 'multiple taxation,'. . ." *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 458 (1959). The First Use Tax does both. It exposes natural gas flowing in interstate commerce to the threat of multiple taxation, and it unfairly discriminates against interstate commerce in three respects.

First, the tax is discriminatorily imposed only on gas imported into Louisiana (whether from a sister state or from outside the United States) and on gas produced from the OCS. Such gas is moving in interstate or foreign commerce at the time it is transported into Louisiana, and continues in interstate commerce, without interruption, until it is transported out of, or is sold at wholesale for ultimate consumption within, Louisiana. An equivalent tax is not imposed on gas produced in Louisiana or on gas transported into

[22] For example, there are measurement and storage facilities in most states, and gas there is frequently processed, exchanged, or subjected to analogous "uses."

Louisiana from a state that imposes a severance tax. Yet the post-production flow of such gas enjoys the same protections and privileges, and subjects Louisiana's environment to the same purported damages, as OCS and imported gas. In practical effect, what purports to be a tax on the "use" of natural gas within Louisiana is in fact a tax on the privilege of transmitting OCS and imported natural gas into and through Louisiana in interstate commerce.[23]

Second, the Louisiana Severance Tax Credit[24] permits taxpayers liable for the First Use Tax to credit that liability, dollar-for-dollar, against their liability for Louisiana's severance tax, which is set at the same rate of seven cents per Mcf,[25] up to the amount of that liability. The First Use Tax, applied in conjunction with the Severance Tax Credit, discriminates against (and is

[23] Although natural gas produced in Louisiana is subject to a Louisiana severance tax at a comparable rate, the First Use Tax is not an added burden on interstate commerce that "compensates for a like burden on in-state sales, [or] neutralizes an economic advantage previously enjoyed by [interstate commerce]." Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 332 (1977). The severance tax is intended to compensate the state for the depletion of its natural resources, to which OCS and imported natural gas do not contribute. Thus the severance tax is not a "like burden." Moreover, Louisiana exempts from the First Use Tax natural gas subject to another state's severance tax, which gas will not be subject to any Louisiana tax.

In addition, the burden of the First Use Tax and the severance tax will not fall on similarly situated taxpayers. Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 70 (1963). Louisiana law allows contract provisions that impose the severance tax upon the producer. LA. REV. STAT. ANN. § 47:633.1. Thus the buyer of Louisiana-produced gas may contractually impose the severance tax burden upon the producer, whereas the buyer of OCS gas is affirmatively prevented from obtaining reimbursement from the producer.

[24] First Use Tax on Natural Gas — Severance Tax Credit, Act No. 436, 1978 La. Sess. Law Serv. 842 (West) (to be codified as LA. REV. STAT. ANN. § 47:647).

[25] LA. REV. STAT. ANN. § 47:633(9) (West Supp. 1978).

designed to discriminate against) interstate commerce because it favors pipeline companies that produce natural resources subject to the Louisiana severance tax and burdens those that do not.

Third, the First Use Tax discriminates against interstate commerce because it exempts from liability for the tax volumes of natural gas, otherwise subject to the tax, consumed in specified uses in Louisiana. Volumes of natural gas subject to the tax consumed in similar uses in other states are not given an equivalent exemption. Louisiana has, therefore, favored certain in-state uses, such as production within Louisiana of sulphur, fertilizer, and anhydrous ammonia, to the disadvantage of similar out-of-state uses.

5. *The Louisiana First Use Tax Is Not Fairly Related To Services Provided By Louisiana.*

The First Use Tax fails the final test set forth in *Department of Revenue of Washington* because it is not fairly related to the services provided by the taxing state.

The size of the First Use Tax, which if sustained by this Court will return more than $225,000,000 annually to the State of Louisiana, is utterly disproportionate to the minimal burdens which the taxed activity places upon Louisiana or to the minimal privileges and protections afforded by Louisiana. This can be seen in several ways.

First, the First Use Tax and the severance tax have been set at equivalent rates, yet it is apparent that the latter is intended to compensate the state for the loss of its natural resource as the name, "severance," implies, a loss not present in the case of the "use" of gas produced outside Louisiana.

Second, less than one quarter of the funds collected by the tax will go to a "Barrier Islands Conservation

Account"[26] for financing capital improvement projects designed to conserve, preserve and maintain barrier islands, reefs and shores of the Louisiana coastline.

Third, and notwithstanding the disproportionate size of the First Use Tax levy, the State of Louisiana already receives substantial compensation for any alleged damage to its coastal areas. For example, Louisiana imposes other taxes upon interstate pipelines, such as *ad valorem* property taxes on interstate facilities, franchise taxes imposed as a condition of doing business in Louisiana, properly-apportioned income taxes, and sales and use taxes. These taxes fairly and properly raise money to support the services and protections provided by Louisiana.

More directly, the Federal Government, through the Coastal Zone Management Act,[27] has already provided for an assortment of grant programs, including a Coastal Energy Impact Fund, to compensate states harmed by OCS development activity. The expressed rationale of the First Use Tax is untenable where the Federal Government already provides for compensation made necessary by the transmission of OCS gas through Louisiana.[28]

[26] First Use Tax Trust Fund, Act No. 293, 1978 La. Sess. Law Serv. 480 (West) (to be codified as LA. REV. STAT. ANN. § 47:1351), which is reproduced in the Appendix to this brief.

[27] *See* 86 Stat. 1280-89, 16 U.S.C. § 1451-1464 (1976), and especially 16 U.S.C. § 1456a, *as amended by* Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (1978). For example, 16 U.S.C. § 1464(a)(3) authorizes $130,000,000 annually for grants under just part of this program.

[28] Moreover, Louisiana has enacted its own Coastal Zone Management Act, Act No. 361, 1978 La. Sess. Law Serv. 704 (West) (to be codified as LA. REV. STAT. ANN. § 49:213.1-.21), under which pipeline companies must obtain coastal use permits.

Finally, if the First Use Tax is intended to be fairly related to the "services" provided by Louisiana through damage to its waterbottoms, barrier reefs, and sensitive shorelines, then the tax is seriously under-inclusive in a discriminatory and impermissible manner. An equivalent tax is not imposed on natural gas produced in Louisiana or on gas which passes through Louisiana but is produced in any other state that imposes a severance or production tax. Substantial volumes of natural gas produced in Louisiana and other states are transported into and through Louisiana *in the same facilities used to transport OCS and imported gas*, and these volumes of gas traverse Louisiana's waterbottoms, barrier reefs, and shorelines, creating similar risks and doing equivalent "damage." Yet these volumes are not subject to the First Use Tax.

B. *The Louisiana First Use Tax Violates The Supremacy Clause.*

Where federal legislation has preempted a field of enterprise, state law, whether or not in direct conflict with federal regulation, is void as a violation of the supremacy clause.[29] And a state law that directly conflicts with applicable federal statutes and regulations violates the supremacy clause whether or not the field has been fully preempted.

The Natural Gas Act,[30] the Natural Gas Policy Act of 1978,[31] and the Outer Continental Shelf Lands Act,[32] constitute a comprehensive scheme duly adopted by the Congress for the regulation, enforcement and promotion of the production of natural gas and the sale,

[29] Where, as here, the affected area involves interstate commerce, state legislation in the area preempted by federal regulation also violates the commerce clause.

[30] 52 Stat. 821-33, 15 U.S.C. §§ 717-717w (1976).

[31] 92 Stat. 3350, Pub. L. No. 95-621 (1978).

[32] 67 Stat. 462-70, 43 U.S.C. §§ 1331-1343 (1976).

transportation and pricing of interstate gas. Prior decisions of this Court make it clear that this federal legislation has preempted state regulation of all gas in interstate commerce, whether occurring before, during, or after transmission by an interstate pipeline. This legislation, in fact, was intended to plug the gap resulting from earlier judicial decisions prohibiting state regulation of the interstate natural gas business.[33] *Phillips Petroleum Co. v. Wisconsin,* 347 U.S. 672, 682-83 (1954). *Accord, Northern Natural Gas Co. v. State Corporation Commission,* 372 U.S. 84 (1963).

Moreover, the First Use Tax has been preempted by federal regulation as well as by statute. The attempt of the tax is to reach, and coincidentally to regulate, gas that is dedicated to interstate markets by contracts and/or FERC certificates of public convenience and necessity issued pursuant to the Natural Gas Act.

More specifically, the First Use Tax violates the supremacy clause in two respects. First, it declares contractual provisions requiring reimbursement by producers of costs incurred by pipelines (including taxes) "to be against public policy and unenforceable to that extent." § 47:1303C. Section 7(c) of the Natural Gas Act,[34] however, provides that no person may sell or transport natural gas in interstate commerce for resale without first obtaining a certificate of public convenience from the Commission. These certificates generally are made in full recognition of, and incorporate the terms and conditions of, the underlying contract for the sale of natural gas. Numerous contracts contain provisions requiring the producer or gatherer selling natural gas to an interstate pipeline to reimburse the pipeline for all costs (including any taxes) incurred as a result of extracting natural gas, liquids or other

[33] *See, e.g.,* Missouri ex rel. Barrett v. Kansas Natural Gas Co., 265 U.S. 298 (1924).

[34] 56 Stat. 83, 15 U.S.C. § 717f(c) (1976).

treatment of the gas. The First Use Tax, by purporting to abrogate such provisions, conflicts with the federal regulatory scheme and violates the supremacy clause.

Second, Section 4 of the Outer Continental Shelf Lands Act[35] provides that "[S]tate taxation laws shall not apply to the outer Continental Shelf." Notwithstanding the label given to it in the statute, the First Use Tax is in economic effect a tax on gas produced from the OCS. No amount of drafting semantics should permit Louisiana to thwart the explicit federal policy of developing OCS resources without state interference. Numerous federal statutes, and numerous decisions of this Court, have drawn a clear line of demarcation between the Federal Outer Continental Shelf and the state waters closer to shore. Louisiana should not be permitted to eradicate that historic line of demarcation.

C. *The Louisiana First Use Tax Is An Unconstitutional Impost Or Duty On Imports.*

Article I, section 10, clause 2 of the Constitution states:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . .

The purpose of the import-export clause are three:

> [T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, [cannot] be implemented by the States consistently with that exclusive power; import revenues [are] to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States [may] be disturbed unless seaboard States, with their crucial ports of entry, [are] prohibited from levying taxes on citizens of other States by taxing

[35] 67 Stat. 462, 43 U.S.C. § 1333(a)(2) (1976).

> goods merely flowing through their ports to the other States not situated as favorably geographically.

Michelin Tire Corp. v. Wages, 423 U.S. 276, 285-86 (1976) (footnotes omitted).

The Louisiana First Use Tax, which unquestionably reaches imports,[36] offends two of the three above-cited policy considerations. First, the First Use Tax prevents the Federal Government from dealing uniformly with foreign trade. Second, the First Use Tax disturbs the harmony among the states by exploiting Louisiana's favorable seaboard location. Each "offense" is sufficient to render the tax unconstitutional.[37]

1. *The Louisiana First Use Tax Reaches Imports.*

By its terms the First Use Tax applies to imported natural gas "which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country." § 47:1303A. The United States does not

[36] Of course, the constitutional prohibitions against state taxation will not apply after imported goods lose their status as imports. *Michelin, supra* at 286-87.

[37] In addition, the First Use Tax fits within the category the status of which was explicitly reserved in Dep't of Revenue of Washington v. Ass'n of Washington Stevedoring Companies, 435 U.S. 734 (1978). There this Court decided that an otherwise unobjectionable tax is not made objectionable because it applies to goods in transit, so long as the tax does not fall on the goods themselves, but reserved "the question of the applicability of the *Michelin* approach when a State directly taxes imports or exports in transit." 435 U.S. at 757 n.23.

The First Use Tax is such a tax. It applies to natural gas in transit — indeed, two of the definitions of "use" refer explicitly to transportation. And it is a direct tax on volume — it is measured simply by the volume of gas subject to the taxed uses.

Therefore, even if this Court were to sustain the First Use Tax under the *Michelin* criteria, a traditional analysis should void the tax as an unconstitutional direct tax upon imports in transit.

now impose "any import tax or tariff" on natural gas imported into the United States.[38]

Moreover, the First Use Tax is imposed upon, *inter alia,* the sale, transportation, transfer of possession or control, "or other ascertainable action at a point within the state." § 47:1302(8). In this way the First Use Tax "intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the state." *Brown v. Maryland,* 25 U.S. (12 Wheat.) 419, 443 (1827). Only when natural gas passes into the local distribution system, is no longer at high pressure, and is divided into the many small streams that connect to consumption outlets, is the "original package" broken, *East Ohio Gas Co. v. Tax Commission of Ohio,* 283 U.S. 465, 470-71 (1931), and the gas sufficiently "incorporated with the general mass of property" to lose its status as an import. *Brown,* 25 U.S. (12 Wheat.) at 443.

2. *The Louisiana First Use Tax Would Complicate The Federal Government's Foreign Trade Policy.*

The first prong of the *Michelin* test is whether the First Use Tax offends the requirement that this country have a consistent foreign trade policy: "The Federal Government must speak with one voice when regulating commercial relations with foreign governments." 423 U.S. at 285. The First Use Tax fails this test.

In contrast to the ad valorem tax assessed in a non-discriminatory manner against inventory, which was upheld in *Michelin,* the First Use Tax does "create special . . . preferences for certain domestic goods" — namely, for natural gas produced in Louisiana — and its application will discourage importation of a product

[38] Natural gas is imported into the United States free of any customs duties, 76 Stat. 72, 19 U.S.C. § 1202, Schedule 4, Part 10, Item 475.15 (1976).

governed by federal regulation in a manner inconsistent with that regulation. *Michelin,* 423 U.S. at 286. If the Louisiana First Use Tax is applied to imported natural gas, seaboard states, and states bordering on Canada and Mexico — for other states will be free to follow — will be "allowed to exercise their own initiative in the regulation of foreign affairs." *Youngstown Sheet & Tube Co. v. Bowers,* 358 U.S. 534, 556 (1959).[39]

3. *The Louisiana First Use Tax Would Disturb The Harmony Among The States.*

The third prong of the *Michelin* test is whether the First Use Tax offends the need for interstate harmony:

> [H]armony among the States [may] be disturbed unless seaboard States, with their crucial ports of entry, [are] prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically.

423 U.S. at 285-286. By imposing the First Use Tax, Louisiana, a seaboard state, has attempted to do just that. As this Court noted in *Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734, 754 (1978), "the desire to prevent interstate rivalry and friction does not vary significantly from the primary purpose of the Commerce Clause." Thus the tests are similar; a tax passes constitutional muster under the import-export clause "if the tax falls upon a taxpayer with reasonable nexus to the State, is properly apportioned, does not discriminate, and relates reasonably to services provided by the

[39] For example, in addition to current imports of substantial quantities of natural gas from Canada, the possible importation of natural gas from Mexico is now the subject of delicate negotiations at the federal level. *See, e.g.,* N.Y. Times, Mar. 19, 1979, § D, at 5, col. 5. The First Use Tax may pose a serious threat to those very real negotiations.

State." As has been shown in the preceding section, the First Use Tax does not satisfy any of these tests.

D. *The Louisiana First Use Tax Unconstitutionally Impairs The Obligation Of Contracts.*

Article I, section 10, clause 1, of the United States Constitution states: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."

Traditionally, in determining consistency with the contracts clause, the analysis has focused on "whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398, 438 (1934).

Allied Structure Steel Co. v. Spannaus, ____ U.S. ____, 57 L. Ed. 2d 727 (1978), decided last term, set forth four considerations that allow a state law to survive a contracts clause challenge. First, the law should "deal with a broad, generalized economic or social problem." Second, it should "operate in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken." Third, it should "effect simply a temporary alteration of the contractual relationships of those within its coverage." Finally, it should be aimed broadly and not at a narrow class of persons. 57 L. Ed. 2d at 740.

The First Use Tax declares unenforceable contractual provisions that otherwise would apply to provide reimbursement by producers to pipelines for taxes imposed by operation of state law. § 47:1303C. The effect of this nullification will be to increase the cost of natural gas to plaintiff states and their citizens above the level permissible by contract. Whether it is analyzed under traditional legal principles or under the more recent *Spannaus* criteria, the nullification clause cannot be sustained.

Under the traditional test, it is clear that the nullification clause does not address a "legitimate end." There is simply no social or economic reason for a provision that impairs reimbursement provisions in existing contracts. It does not increase the revenue raised by the tax; a reimbursement provision would redistribute the tax burden but leave revenues to the state unaffected. If the tax is truly intended to protect Louisiana's environment and compensate its citizens for damage done to waterbottoms, barrier reefs, and shorelines, that purpose will be served just as well by monies collected from producers as by monies from pipelines. Of course, local political realities may have dictated the need for a nullification provision insulating the producers from the effects of the tax,[40] but that is not such a "legitimate end" as to justify the impairment of contracts.

Applying the *Spannaus* criteria, the nullification clause similarly fails to pass constitutional muster. First, it does not "deal with a broad, generalized economic or social problem" — in fact, the nullification clause does not purport to deal with any generalized problem at all, other than the existence of reimbursement provisions. Second, the reimbursement of costs and taxes is clearly not "an area already subject to state regulation at the time the company's contractual obligations were originally undertaken," because the area of rate and cost regulation has been preempted by the federal government. (See Section B, *supra*.) Third,

[40] Because federal regulation imposes statutory ceilings upon the price of natural gas, the large oil producers that produce natural gas in the OCS may not be able to pass along fully the increased costs that would be occasioned by imposition of the First Use Tax upon producers (by virtue of reimbursement clauses in their contracts with pipeline companies). Moreover, there is no certainty that a proceeding under the Natural Gas Act would result in a fully-passed-on cost. This is yet another illustration of how the First Use Tax interferes with the federal regulatory system, and why the tax must be declared to be unconstitutional.

the nullification clause does not temporarily alter contractual relationships, but works a "severe, permanent, and immediate change in those relationships — irrevocably and retroactively." Finally, the nullification clause is aimed only at a narrow class of persons, the pipeline companies. *Spannaus,* 57 L. Ed. at 740.

E. *The Louisiana First Use Tax Denies Equal Protection Of The Laws.*

An otherwise valid tax will be struck down if it deprives taxpayers of equal protection of the laws guaranteed under the fourteenth amendment to the United States Constitution. *Wheeling Steel Corp. v. Glander,* 337 U.S. 562 (1949). The First Use Tax does precisely that.

By its Severance Tax Credit, Louisiana permits any taxpayer liable for the payment of the First Use Tax to credit such payments against any severance taxes owed by the taxpayer to Louisiana. § 47:647A. The Severance Tax Credit further provides that the credit against severance taxes is not allowed if the taxpayer "has an enforceable right to reimbursement from a third party." § 47:647B. The First Use Tax only applies to those taxpayers who have no liability under Louisiana's severance tax law.

The First Use Tax as intertwined with the Severance Tax Credit thus establishes a classification treating differently taxpayers who are solely engaged in interstate OCS natural gas activity from taxpayers who are also engaged in in-state production of natural resources. This classification is unreasonable and irrelevant to the purported purposes of the First Use Tax and results in a denial of equal protection of the law, in contravention of fourteenth amendment. This Court should not uphold a state tax having an unequal impact on interstate commerce where there is no

political check against unduly burdensome state action. *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978).

CONCLUSION

As has been demonstrated above, plaintiffs have raised serious issues relating to whether the Louisiana First Use Tax is an unconstitutional discrimination against and burden upon interstate commerce, a violation of the supremacy clause, an unconstitutional impost or duty on imports, an unconstitutional impairment of contracts, and a denial of equal protection. For these reasons, and because this case presents substantial federal questions the prompt resolution of which are critical to the national development of domestic energy and economic policy, it is respectfully submitted that leave should be granted to file the proposed Complaint invoking the original jurisdiction of this Court.

Respectfully submitted,

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APPENDIX

First Use Tax Trust Fund

ACT NO. 293

HOUSE BILL NO. 767

An Act to amend Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950 by adding thereto a new Chapter to be designated Chapter 16 thereof to contain a Part II containing Section 1351, to create and provide for the First Use Tax Trust Fund in the state treasury as a special and irrevocable trust fund for the proceeds to be derived from a first use tax and any new or alternate tax on the same resources; to establish certain accounts within said trust fund to be used for state debt retirement, redemption of outstanding debt, capital improvements of the barrier islands, reefs, and shores of the coastline; and to provide for reimbursement to the general fund for certain tax credits.

Be it enacted by the Legislature of Louisiana:

Section 1. Part II of Chapter 16 of Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950 containing Section 1351 is hereby enacted to read as follows:

Part II. Use Proceeds

SUBPART A. FIRST USE TAX TRUST FUND

§ 1351. Creation

A. (1) The First Use Tax Trust Fund is hereby created in the state treasury as a special and irrevocable trust fund for the deposit of the proceeds, and investment income derived therefrom, of the first use tax imposed by law in 1978 or thereafter and any new or alternative tax hereafter imposed by law on uses of those resources subject to any such tax. Out of the first proceeds of the first use tax the treasurer shall pay into the State General Fund such amounts as are determined by the secretary of the Department of Revenue and Taxation to be necessary to fully reimburse the State General Fund for monies lost to that fund by reason of the tax credits granted by law

which are related to the imposition of the first use tax. The remainder of such tax proceeds shall be credited to the following accounts, which are hereby created within the First Use Tax Trust Fund, and shall not be deposited in the Bond Security and Redemption Fund or the State General Fund.

(2) Distribution; debt accounts. Seventy-five percent of the proceeds, and all investment earnings derived therefrom, shall be deposited in the Initial Proceeds Account and the Debt Retirement and Redemption Account, which are hereby created, in the following manner:

(a) Initial Proceeds Account. From this portion of the proceeds of the tax, amounts shall be credited to the Initial Proceeds Account until the sum of five hundred million dollars has been so credited. The sum of five hundred million dollars credited to this account from the proceeds of the tax shall be maintained in that amount at all times and, except for investment and except as provided in Paragraph C of this Section, monies in the Initial Proceeds Account shall not be used for any purpose. Monies in this account shall be invested, in accordance with law, and the investment earnings shall accrue to that account.

(b) Debt Retirement and Redemption Account. All proceeds of this portion of the tax over and above the amount required to be credited to and be maintained in the Initial Proceeds Account shall be credited to the Debt Retirement and Redemption Account. Monies in this account shall be invested, and the investment earnings shall accrue to that account. Except for investment, monies in the Debt Retirement and Redemption Account shall be used solely to purchase, in advance of maturity, on the open market any outstanding obligations of the state, or to call, pay, or redeem in advance of maturity any outstanding bonds, notes, or other evidences of state debt, or both. No purchase or redemption of state debt shall be made unless the purchase or redemption results in interest savings to the state. The methods by which this

Section shall be implemented shall be determined by the state treasurer, with concurrence of two-thirds of the members of the State Bond Commission, acting in open session.

(3) Distribution conservation account. Twenty-five percent of the proceeds, and all investment earnings derived therefrom, shall be deposited in the Barrier Islands Conversation Account. The monies in the Barrier Islands Conservation Account shall be invested and the investment earnings shall accrue to that account. Except for such investment, monies in this account shall be used exclusively to fund capital improvement projects designed to conserve, preserve, and maintain the barrier islands, reefs, and shores of the coastline of Louisiana. Only such capital improvements as are contained in the comprehensive capital budget adopted by the legislature each year shall be so funded.

B. The state treasurer shall invest all monies in the accounts created by Subsection A hereof in accordance with the laws governing the investment of idle funds of the state.

C. If the state treasurer determines that the best interest of the state would be served, but only if the Debt Retirement and Redemption Account is not funded or for any reason is depleted, the treasurer, with concurrence of two-thirds of the members of the State Bond Commission, acting in open session, may expend such portion of the investment earnings in the Initial Proceeds Account as are not necessary to provide the balance of five hundred million dollars in the Initial Proceeds Account required by Subsection A hereof for any purpose for which the Debt Retirement and Redemption Account may be used.

D. The funds deposited in the First Use Tax Trust Fund shall be considered escrowed and shall not be used for any of the purposes enumerated herein until the proceeds of the first use tax are determined to be available for such uses by the treasurer, with concurrence of two-thirds of the members of the State Bond Commission acting in open session. If by final action of a court of last resort the

tax held in escrow in the state treasury is held to be invalid as to any taxpayer who paid the tax, the taxes paid, with interest accrued thereon, shall be repaid to the taxpayer.

E. The secretaries of the Department of Wildlife and Fisheries, the Department of Natural Resources, and the Department of Transportation and Development shall meet and annually make recommendations to the governor as to capital improvement projects designed to conserve, preserve, restore, and maintain the barrier islands, reefs, and shores of the coastline of the state. The governor shall place such of those projects as he deems to be in the best interest of the state in the comprehensive capital budget for consideration by the legislature. Only those projects approved by the legislature shall be funded.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

Section 4. The provisions of this Act shall remain in full force and effect unless expressly repealed.

Approved July 6, 1978.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 83, ORIGINAL

STATE OF MARYLAND, ET AL,
Plaintiffs,

V.

STATE OF LOUISIANA,
Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND, ET AL,
Plaintiffs,

V.

STATE OF LOUISIANA,
Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

JURISDICTION

This action is pending on a Motion for Leave to File a Complaint and does not present the issue of constitutionality of the Louisiana statutes in question. This is not a controversy between the Plaintiff States and Louisiana which falls within the original and exclusive jurisdiction of this Court. The Plaintiff States have no interest legal and recognizable in this dispute either in their

proprietary capacities or on behalf of their citizens and, hence, the provisions of Article III, Section 2 of the Constitution of the United States are not applicable.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

The sole question presented in this Motion is whether or not the Plaintiff States have proper standing to institute this action and particularly whether or not they are the real parties at interest in this controversy. Specifically, the question of the constitutionality, the wisdom, the merits, or the reasonableness of the Louisiana First Use Tax is not at issue on this Motion. The sole and only question relates to the procedural standing of the Plaintiff States to institute this action, and, hence, to invoke the original jurisdiction of this Honorable Court.

1. Should this Court exercise its original jurisdiction over a challenge by some states to the tax laws of another state if there is now pending an action in state court which will effectively dispose of all constitutional claims Plaintiff States are attempting to bring before this court?
2. Does the original jurisdiction of the Supreme Court extend to a challenge by several states to the tax laws of another state on the grounds that those laws infringe upon the federal constitutional rights of individual citizens?

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2 of the Constitution of the United States provides:

"The judicial Power shall extend ... to Controversies between two or more States; ...
In all Cases ... in which a State shall be Party, the Supreme Court shall have original Jurisdiction. ..."

COUNTER-STATEMENT OF THE CASE

Plaintiff States seek to set aside and enjoin, on alleged constitutional grounds, Louisiana's First Use Tax on Natural Gas (hereinafter referred to as "First Use Tax"),[1] by alleging a purported controversy between themselves and the State of Louisiana under two theories. The first is proprietary in nature. Plaintiff States are themselves consumers of gas and will, they say, sustain an increased economic burden because Louisiana's First Use Tax will be passed on to them.[2]

Plaintiff States second theory is as *parens patriae* for their citizens, to protect their alleged right to be free of any burden on interstate commerce.

In neither of these respects have Plaintiff States asserted adequate justiciable interest to warrant the application of the extraordinary original and exclusive jurisdiction of this Honorable Court.

Although raised by Plaintiffs, none of the factual averments in the "Statement" of Plaintiffs' Brief (pages 4, 5 and 6) are germane to the real issue before this Court.

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1. First Use Tax on Natural Gas, Act. No. 294 of 1978, Regular Session (La. R.S. 47:1301-1307).
2. If it is passed on in the future, it will not be because Louisiana's First Use Tax requires it. The legal incidence of the tax is upon the first user of the gas *within Louisiana*; although an economic burden might ultimately be on Plaintiffs. See *First Agricultural Bank v. State Tax Commission*, 392 U.S. 339 (1967), *Gurley v. Rhonde*, 421 U.S. 200 (1975). Plaintiffs' status in this respect, is no different from all consumers of goods or services who have at best a remote interest in the litigation of the validity of the tax.

SUMMARY OF ARGUMENT

I.

STANDING

The Plaintiff States do not have nor do they acquire standing by virtue of their alleged proprietary interests or as *parens patriae* of their citizens to challenge the Louisiana First Use Tax.

An objection by several States to the imposition of a tax in another State is not such a controversy as will appropriately place the issue of the initial determination of the validity of said tax within the original jurisdiction of this Court.

This action is squarely precluded by the decision in *Arizona v. New Mexico*, 425 U.S. 794 (1976).

II.

THE LOUISIANA FIRST USE TAX DOES NOT RAISE IMPORTANT AND SUBSTANTIAL FEDERAL QUESTIONS AND IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

The Louisiana Legislature enacted Act No. 294 of 1978, which established the First Use Tax on Natural Gas, however, the tax was not to commence accruing until April 1, 1979 at 7:00 o'clock A.M.

Section 1303(A) of Title 47 of the Louisiana Revised Statutes of 1950, as amended by Act 294 of 1978, provides in pertinent part:

> ". . . there is hereby levied and imposed a tax upon the first occurrence within this State of any use, as defined in this Part, of any natural gas upon which no severance tax or tax upon the volume of production has been paid, or is legally due to be paid, to this State or any other State or territory of the United States, or which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country. . . ."

Section 1302(8) of Title 47 of the Louisiana Revised Statutes of 1950, as amended by Act 294 of 1978, defines "use" for the purpose of the tax as:

> "... the sale; the transportation in the State to the point of delivery at the inlet of any processing plant; the transportation in the State of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; transfer of possession or relinquishment of control at a delivery point in the State; processing for the extraction of liquefiable component products or waste materials; use in manufacturing; treatment; or other ascertainable action at a point with the state."

Section 1303(E) and (F) of Title 47 of the Louisiana Revised Statutes of 1950, as amended by Act 294 of 1978, provides:

> "E. Nothing in this part shall be construed as imposing any tax on the production, severance, or ownership of natural gas produced outside of the boundaries of the State of Louisiana, it being the intention of this Part that the incidence of this tax shall not be upon the natural gas nor upon the property or rights from which it is produced, but rather shall be only upon the privilege of performance or allowing the performance, by the owner, of the enumerated actions comprising first use within the State.
>
> F. If any use as defined in this Part and first occurring is determined not to be a constitutionally taxable incident, the tax shall be imposed upon the use first occurring thereafter."

Plaintiff States allege the unconstitutionality of The First Use Tax upon the legal premises that:

1) it is a discriminatory burden upon interstate commerce for (a) it is a tax on interstate commerce; (b) there is insufficient nexus to support a taxable incidence in the State; (c) it is not fairly apportioned; (d) it discriminates against interstate commerce; and (e) it is not fairly related to the services provided by the State;

2) it violates the Supremacy Clause of the United States Constitution because it conflicts with the Natural Gas Act, The Natural Gas Policy Act of 1978 and the Outer Continental Shelf Lands Act;

3) it is an impost or duty on imports;

4) it impairs the obligations of contracts; and,

5) it denies equal protection of the laws.

Interstate Commerce may be compelled to pay its way where in the past it has been able to avoid payment for the services rendered by the State of Louisiana and the adverse impact made upon the State of Louisiana. The First Use Tax meets all constitutional standards established by this Court which allows States to justifiably burden interstate commerce. The tax is *not* an undue burden on interstate commerce as alleged by Plaintiff States.

ARGUMENT

I.

PLAINTIFF STATES DO NOT HAVE STANDING TO CHALLENGE THE LOUISIANA FIRST USE TAX

A. PLAINTIFF STATES DO NOT HAVE STANDING IN THEIR PROPRIETARY CAPACITIES TO CHALLENGE THE LOUISIANA FIRST USE TAX.

It has long been established that in order for a plaintiff state to invoke the original jurisdiction of this Court, it must demonstrate that the injury for which it seeks redress was directly caused by the actions of another state. *Massachusetts v. Missouri*, 308 U.S. 1, (1939); *Pennsylvania v. New Jersey*, 426 U.S. 660, (1976).

Plaintiff States claim that they as consumers, and their political subdivisions and educational institutions, as consumers of natural gas will suffer financial distress as a result of the Louisiana First Use Tax.

In *Arkansas v. Texas*, 346 U.S. 368 (1953), this Court succinctly stated the rule to be used in determining if a state was truly a real party at interest. The rule is as follows:

> "In determining whether the interest being litigated is an appropriate one for the exercise of our original jurisdiction, we of course, look behind and beyond the legal form in which the claim of the state is pressed. We determine whether in substance the claim is that of the state, whether the state is indeed the real party in interest." 346 U.S. 371.

Defendant State is not attempting in any manner to impose a tax on other states or other instrumentalities. The First Use Tax is imposed on the first use of natural gas within the State of Louisiana and the incident of the tax will, in fact, fall upon the owners of the gas at the time a taxable use occurs within the state. Louisiana Revised Statutes, Title 47, Section 1301 through 1307, 1351.

Plaintiff States real complaint is that the Federal Energy Regulatory Commission (FERC) has, through a series of orders, provided procedures which permit affected pipeline companies to pass along the amount of the Louisiana First Use Tax to their customers, subject to refund with interest should the tax ultimately be found invalid.[3]

As a practical matter in any regulated or unregulated industry, all taxes — local, state or federal — are ultimately passed along to the consumer be they individuals, political subdivisions or states of the United States. Defendant Louisiana has caused no direct injury to Plaintiff States such as would render them real parties at interest and thus invoke the original jurisdiction of this Court. Plaintiff States do not have standing in their proprietary capacity to challenge the Louisiana First Use Tax.

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3. State of Louisiana First Use Tax in Pipeline Rate Cases, Docket No. RM 78-23, Order No. 10, "Order Establishing Procedures Governing Pipeline Recovery of the State of Louisiana First Use Tax," issued August 28, 1978, 43 Fed. Reg. 45, 553 (October 3, 1978); Order No. 10-A, "Order on Rehearing, Modifying Prior Order, Amending Regulation and Requesting Comment," issued December 20, 1978, 43 Fed. Reg. 60 438 (December 28, 1978), Appeal Docketed, Tennessee Gas Pipeline Company v. Fed. Energy Regulatory Commission, No. 78-38-13, et al (5th Cir., December 26, 1978); and Order No. 10-B, "Order on Rehearing, Modifying Prior Order and Amending Regulations," issued March 2, 1979, 44 Fed. Reg. 13, 460 (March 12, 1979.)

B. PLAINTIFF STATES DO NOT HAVE STANDING TO CHALLENGE THE LOUISIANA FIRST USE TAX AS *PARENS PATRIAE* OF THEIR CITIZENS WHO ARE CONSUMERS OF NATURAL GAS.

Plaintiff States urge that they have standing to invoke the original jurisdiction of this Court as *Parens Patriae* of their citizens, as consumers of natural gas, which may be subject to the Louisiana First Use Tax. They bring to the attention of this Court in support of their claim the case of *Pennsylvania v. West Virginia*, 262 U.S. 553, (1923). There is an important distinction between the case of *Pennsylvania v. West Virginia* and the instant case. West Virginia was attempting to cut off or curtail natural gas flowing into Pennsylvania. Louisiana is not attempting in any way to deprive any of the Plaintiff States or their citizens of natural gas.

A state has standing to sue only when its sovereign or quasi sovereign interests are implicated and not to litigate the personal claims of its citizens.[4] For the previously discussed reasons, Plaintiff States' citizen consumers who may be called upon as a result of FERC regulations to bear the cost of the tax are in no different position than any consumer of any product or service who must bear added cost resulting from local, state and federal taxes, be they sales taxes, use taxes or gross receipts taxes.

Plaintiff States do not have standing to invoke the original jurisdiction of this Court to challenge

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4. *Pennsylvania v. New Jersey*, supra.

the Louisiana First Use Tax as *Parens Patriae* of their citizens who are consumers of natural gas. Were this permitted, this Court would be inundated with original jurisdiction suits every time FERC or some other regulatory agency allowed rate adjustments.

C. THIS SUIT IS BARRED BY THE DECISION IN *ARIZONA V. NEW MEXICO*.

In *Arizona v. New Mexico*, 425 U.S. 794 (1976), this Court declined to exercise its original jurisdiction in a suit strikingly similar to the case now before the Court. Comparison of *Arizona* and this case will leave no doubt that this Court should again decline to take action.

Arizona, in its Bill of Complaint, asked for declaratory relief invalidating a New Mexico electrical energy tax as being unconstitutionally discriminatory against and a burden on interstate commerce, that it denied Arizona citizens due process and equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States and that it abridged the privileges and immunities guaranteed by Article IV, Section 2 of the Constitution of the United States. It asked that the Court enjoin New Mexico from assessing, levying or collecting the tax. The issues presented and relief desired were not unlike the present case.

The State of Arizona, as a consumer, and its citizens, as consumers, purchased substantial amounts of electrical energy generated in New Mexico and the subject of the electrical energy tax.

Arizona sought to invoke the original jurisdiction of this Court in its proprietary capacity and as *Parens Patriae* for its citizens urging that the tax was a burden economically on it and its citizens. In the instant case, we have Plaintiff States asserting that Louisiana's First Use Tax will fall on them and their citizens causing economic hardship and, as in the Arizona case, filing a complaint in this Court in their proprietary capacity and as *Parens Patriae* for its citizens. Three Arizona utilities filed suit in New Mexico State Court raising the Constitutional issues previously discussed.

Although the initial returns as to Louisiana's First Use Tax are not due until May 31, 1979, the State officers, constitutionally charged with responsibilities as to the administration, collection and enforcement of the First Use Tax, instituted an action in the Nineteenth Judicial District Court for the Parish of East Baton Rouge, a State Court of general jurisdiction. *Edwards et al v. Transcontinental Gas Pipe Line Corp., et al,* No. 216,867, 19th Judicial District Court, Division "F", Parish of East Baton Rouge, State of Louisiana. Named as Defendants in this litigation are all of the persons who would be liable for the payment of the tax under the statutory provisions thereof.

Additionally, the Federal Energy Regulatory Commission has instituted an action in the Federal District Court for the Middle District of Louisiana, *Federal Energy Regulatory Commission v. Shirley McNamara, et al,* Civil Action No. 78-384, U.S. District Court, Middle District of Louisiana. Named as Defendants therein are Shirley McNamara, William J. Guste, Jr., and Raymond T. Sutton.

A Motion to Stay was granted and is on appeal.[5] Argument has been set for Monday, June 25, 1979.

The issues as posed by the Petition and the answers filed in the State Court and the Federal Court Complaint, allege all the constitutional infirmities raised here by the Plaintiffs. Thus the very same issues which Plaintiffs seek to have this Court consider are before lower courts, both State and Federal. If on appeal the Louisiana Supreme Court should hold the tax unconstitutional, Plaintiffs will have been vindicated. If the Louisiana Supreme Court holds the tax constitutional, the issues will come to this court by way of direct appeals under 28 U.S.C. Sec. 1257 (2). If the Federal proceeding continues, likewise, the matter is ultimately recognized by this Court. There is thus no sound reason for this Court to hear Plaintiffs' complaint, and this is especially true in view of the long-standing congressional and judicial policy not to interfere in State tax matters. 28 U.S.C. Sec. 1341. *Great Lakes Dredge & Dock Company v. Huffman*, 319 U.S. 293 (1943); *Toomer v. Witsell*, 334 U.S. 385 (1949); *Matthews v. Rodgers*, 284 U.S. 521 (1932).

In the *Arizona* case, this Court was persuaded that the pending State Court action provided a forum in which to litigate the same issues as were set forth in the complaint of Arizona filed in this Court and seeking to invoke the original jurisdiction of the Court. In the instant case, a pending

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5. *Federal Energy Regulatory Commission v. Shirley McNamara, et al*, in the United States Court of Appeals for the Fifth Circuit, Docket No. 79-1403.

State Court proceeding with the same issues before it can resolve the issues set forth in Plaintiff States' complaint.

The Court in *Arizona* made the following comment:

> "In denying the State of Arizona leave to file, we are not unmindful that the legal incident of the electrical energy tax is upon the utilities. 96 S. Ct. 1845, 1847."

The legal incident of the Louisiana First Use Tax is not on Plaintiff States or their citizens. It is only owners of the gas at the time a use occurs in Louisiana who are liable for the tax.

Plaintiff States argue in brief that *Arizona v. New Mexico*, supra, should not govern in this case for various reasons. They quote from the concurring opinion that Arizona was "not sufficiently affected" by the tax and had not alleged "some impact on the rates paid by consumers of electricity in Arizona." 425 U.S. at page 798. Defendant State believes pertinent language from the Per Curiam opinion indicates that indeed Arizona was affected by the taxes and the Court's language as follows shows this:

> "The State of Arizona, as a consumer, and its citizens, as consumers, purchase substantial amounts of electrical energy generated in New Mexico by three Arizona utilities operating generating facilities there. Two of the utilities are investor-owned public service corporations; the third, Salt River Project, Agricultural Improvement and Power District, operates a federal reclamation project and is a political subdivision of Arizona." 425 U.S. at page 794.

The above language indicates that two Arizona utilities, as well as a third utility which was a political subdivision of Arizona, would all be liable for the tax. Obviously, if the utilities were going to have to pay a tax on the generation of electricity, they were going to pass on this tax to the consumers, the State of Arizona and its citizens, in the form of a rate increase at some point in time. Plaintiff States distinguish the present case from the *Arizona v. New Mexico* case in that the utility companies refused to pay the New Mexico tax and thus it was not passed on pending challenges to the tax. A campanion statute to the First Use Tax in Louisiana provides for a First Use Tax trust fund and that "if by final action of a court of last resort, a tax held in escrow in the State Treasury is held to be invalid as to any taxpayer who paid the tax, the taxes paid, with interest accrued thereon, shall be paid to the taxpayer." *Act 293 of 1978, Louisiana Revised Statutes 47:1351.* FERC has allowed the pipelines to pay the First Use Tax to Louisiana and to pass the tax on to their customers even though two suits are pending to determine the validity of the tax at this time.

Plaintiff States assert in their brief that the two suits now pending are not suitable vehicles by which they may assert their claim and that their complaint raises issues of national significance and federal law not raised by Arizona's challenge to the New Mexico electrical energy tax and asserts that this is not a simple dispute between two neighboring states as was the case in *Arizona v. New Mexico.*

Defendant State contends that the number of states challenging the First Use Tax and the number of persons claiming to be aggrieved are not sufficient cause to invoke the original jurisdiction of this Court.

There are a number of factors present in the instant case which warrant this Court's denying Plaintiff States' motion to file a complaint and invoke the original jurisdiction of this Court. This Court has long acknowledged and held that state courts of general jurisdiction have the power to decide cases involving federal constitutional rights. *Boston Stock Exchange, et al v. State Tax Commission, et al*,_____U.S._____, (1977). There is at this time, as previously mentioned, a suit pending in the State Court of Louisiana seeking declaratory relief as to the validity and constitutionality of the Louisiana First Use Tax.

An even more compelling reason for this Court refusing to invoke its original jurisdiction, even if it is satisfied that it has jurisdiction, is that it is not a foregone conclusion that the Louisiana First Use Tax statutes do not run afoul of the Louisiana Constitution of 1974 and this has been asserted in the suit filed in Louisiana State Court. The Louisiana Constitution of 1974 is new and to a large measure uninterpreted. The State Court is an appropriate forum for resolution of state constitutional issues and the resolution of these issues may moot any federal constitutional questions which may be asserted.

In *Ohio v. Wyandotte Chemical Corporation*, 401 U.S. 493, (1972), in denying leave to file a complaint invoking the original jurisdiction, the Court stated:

> "This Court is, moreover, structured to perform as an appellate tribunal, ill equipped for the task of fact finding and so forced, in original

> cases, awkwardly to play the role of fact finder without actually presiding over the introduction of evidence. Nor is the problem merely our lack of qualifications for many of these tasks potentially within the purview of our original jurisdiction; it is compounded by the fact that for every case in which we might be called upon to determine the facts and apply unfamiliar legal norms we would unavoidably be reducing the attention we could give to those matters of federal law and national import as to which we are the primary overseers." 401 U.S. at 498.

While Plaintiff States by way of footnote in their brief contend that "this action is not likely to raise many, if any, disputed factual issues, . . .," at page 18, Defendant State urges that there will be extensive factual considerations of great complexity. There will have to be voluminous findings of facts of a scientific and technical nature in determining what "use" and in what way this "use" takes place in order to determine if there is a taxable incident. Again, complex factual determinations will have to be made in determining the damage and cost to Louisiana and her coastal areas, to the care and preservation of which portions of this tax are dedicated.

As suggested earlier in this brief, this is basically a dispute between Louisiana and the corporations upon whom the First Use Tax will fall and not between Plaintiff States and Louisiana.

This is not a classic case in which the original jurisdiction of this Court has been necessary to resolve an issue such as a dispute between states as to the determination of boundaries and water rights. *Wright's Federal Court*, 3d Edition, page 558; *Nebraska v. Iowa*, 406 U.S. 117, (1972); *Kansas v. Colorado*, 105 U.S. 125 (1902).

In the scheme of the Constitution, the State Courts are the primary guarantors of constitu-

tional rights. To this end, the Louisiana Supreme Court, the only Court that can interpret the statute (First Use Tax) with finality, should be permitted to do so. The Louisiana Declaratory Judgment statute (La. Code of Civil Procedure, Arts. 1871-1883) is available to secure such an interpretation. The state court is the sole and only forum where all of the parties may be heard.

Obviously, both the Plaintiffs and the Defendants in the State Court action may be heard there. The Plaintiffs, the Defendants and the Intervenors in the federal court proceedings may also be heard in the State Court proceeding. *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957); additionally, Plaintiff States and Defendant in these proceedings may be heard in the State Court proceedings. *State of Nevada, et al v. Hall*,_____U.S. (March 15, 1979).

The Louisiana Declaratory Judgment Statute is available to public officials, *Hainkel v. Henry*, 313 So.2d 577 (La. Sup. Ct. 1975); *Edwards v. Parker*, 332 So.2d 125 (La. Sup. Ct. 1976), and its application will effectively and expeditiously resolve the constitutional issues surrounding the validity of the First Use Tax. *In Re Oxygen Welder's Sup. Prof. Shar. P&T.A.*, 297 So.2d 663 (La. Sup. Ct. 1974).

Arizona v. New Mexico is clearly applicable in the instant case and should govern, and bar Plaintiff States invoking the original jurisdiction of this Court. Constitutional questions are involved, suits are presently pending on these same issues and Plaintiff States are similar as to capacity to file suit. This Court should deny the motion of Plaintiff States "leave to file a bill of complaint" as this Court did in *Arizona v. New Mexico*, supra.

In submitting that this Court should deny Plaintiffs' Motion, we note the proposition that the Court will exercise its original jurisdiction only

where it is clearly shown that resort to this extraordinary form of action is required. In *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972) the Court noted:

> "It has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly.' . . . We construe 28 USC Sec. 1251 (a) (1), as we do Art. III, Sec. 2, cl 2. to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer."

See also *Washington v. General Motors Corp.*, 406 U.S. 109 (1972) and *Arizona v. New Mexico*, 425 U.S. 794 (1976).

The Court also has recently reaffirmed its view that disputes over the states' imposition of taxes ordinarily should not be entertained in an original action. In *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 497 (1971), Justice Harlan, speaking for the Court, said:

> "As our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. Consider, for example, the frequency with which States and nonresidents clash over the application of state laws concerning taxes, motor vehicles, decedents' estates, business torts, governmental contracts, and so forth. It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies."

II.

THE LOUISIANA FIRST USE TAX DOES NOT RAISE IMPORTANT AND SUBSTANTIAL FEDERAL QUESTIONS AND IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT

RESPONSE TO PLAINTIFFS STATES' ARGUMENTS ON THE VALIDITY OF THE TAX

As previously stated, Louisiana believes that the following discussion is not germane to the real issue presented herein because the merits, or the wisdom, or even the constitutionality of the First Use Tax is not presently before this Court. The sole and only issue to be decided is one of jurisdiction - one of proper standing by states to invoke the extraordinary exclusive, original jurisdiction of this Court. However, since Plaintiff States have seen fit repeatedly to argue all of the substantive issues involved in the constitutional question surrounding the First Use Tax, Louisiana deems it appropriate, indeed, necessary to make this brief response.

The alleged substantial questions raised by Plaintiff States have all been disposed of by this Honorable Court and the standards to be utilized are now well established. The fact that the amount of taxes that may be collected is large is of no moment. The Louisiana First Use Tax does not offend federal statutes.

A. THE LOUISIANA FIRST USE TAX DOES NOT CONSTITUTE AN UNCONSTITUTIONAL AND DISCRIMINATORY BURDEN UPON INTERSTATE COMMERCE

In *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 750 (1978), this Court

held that ". . . As was recognized in *Western Livestock v. Bureau*, supra, interstate commerce must bear its fair share of the state tax burden." Furthermore, taxes have been sustained "that are applied to activity with substantial nexus with the State, that are fairly apportioned, that do not discriminate against interstate commerce, and that are fairly related to the services provided by the State." Id.[6]

The Louisiana First Use Tax, a tax upon the first use of natural gas within the State and not a mere tax on interstate commerce, meets each standard announced by this Court.

1. THE LOUISIANA FIRST USE TAX IS NOT A TAX ON INTERSTATE COMMERCE

The tax in question is imposed upon the first *use* "of any natural gas upon which no severance tax or tax upon the volume of production has been paid or is legally due to be paid, to this state or any other state or territory of the United States, or which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country."[7]

The First Use Tax is not a "gathering tax" as was declared unconstitutional in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954). There, Texas levied a tax on the production of natural gas measured by the entire volume of gas to be shipped in interstate commerce. A refinery extracted the gas from crude oil and transported it 300 yards to the pipeline. The State identified, as a local incident, the transfer of gas from the refinery to the pipeline.

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6. Accord, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 279 (1977).
7. La. R.S. 47:1303(A)

The First Use Tax is not on the production of gas but rather is "upon the privilege of performance or allowing the performance, by the owner, of the enumerated actions comprising first use within the State."[8] The incident of taxation is upon the first use of the natural gas in Louisiana. The exact first occurrence of a defined use is a factual determination that can only be made with a complete disclosure of all relevant facts.

In *Michigan-Wisconsin*, supra, the incident of local taxation was *after* production, sale and processing and merely upon the actual entrance into interstate commerce. The defined uses are set forth in Section 1302(8) of Title 47 of the Louisiana Revised Statutes of 1950, as amended by Act No. 294 of 1978, and all such uses are separate and distinct local activities only occurring within the boundaries of the State of Louisiana. These identifiable uses do not occur in other States and, in fact, occur prior to the gas being commercially acceptable for marketing and sale in interstate commerce.

2. THE LOUISIANA FIRST USE TAX IS APPLIED ON ACTIVITIES HAVING A SUFFICIENT NEXUS WITH LOUISIANA

The gas in question and the defined uses have more than adequate nexus with the State of Louisiana. The issue of nexus is a problem of factual proof. Many processing plants are utilized within the State; several large underground storage facilities are likewise utilized within the State; and, numerous other activities occur within the State prior to the gas attaining the status of being in interstate commerce. The numerous activities occurring to the gas prior to its being in a commercially accepted stage all occur within the State.

8. La. R.S. 47:1303(E).

3. THE LOUISIANA FIRST USE TAX IS FAIRLY APPORTIONED

> "... duly apportioned, that is, does not undertake to tax interstate activities carried on outside of the State's borders; ..."[9]

The Louisiana First Use Tax does not tax any activity not occurring within the State of Louisiana. The tax is not on the gross receipts which are realized outside of the State but rather is on that use of the natural gas which, prior to said use, has been free of any tax.

Multiple taxation cannot occur; the uses upon which the tax is levied do not occur outside of the State of Louisiana. The Plaintiff States may legally tax the gas when it reaches the boundaries of each State once the gas has passed into the local distribution system for delivery to customers.[10] Whereas, the "uses" subject to the First Use Tax occur prior to the gas reaching the steady flow of interstate commerce contrary to the situation in *Michigan-Wisconsin*, supra.

4. THE LOUISIANA FIRST USE TAX DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE

The First Use Tax is not discriminatory in that it does not provide a direct commercial advantage to local business, does not subject interstate commerce to the burden of "multiple taxation,"[11] and does not "discriminatorily tax the products manufactured or the business operations performed in any other State." *Boston Stock Exchange v. State Tax Commission*, _____U.S._____(1977).

The entirety of the First Use Tax is upon the actual use within the State of Louisiana of a product that has not been heretofore subject to any

9. *Mississippi Gas Co. v. Stone*, 355 U.S. 80, 96-67 (1948).
10. *East Ohio Gas Co. v. Tax Commission of Ohio*, 283, U.S. 465 (1931).
11. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

taxation. The tax is imposed upon uses of natural gas after having entered the State of Louisiana all within the ambit of the First Use Tax. The tax incidence occurs in Louisiana prior to the flow of the natural gas in interstate commerce.

An equivalent tax is imposed upon natural gas produced within the State of Louisiana. The First Use Tax removes the discrimination or disadvantage imposed upon gas produced within the State and places the natural gas subject to the First Use Tax on an equal basis with that gas produced within the State, which was not the case heretofore.

The "practical effect" of the First Use Tax is to remove the discrimination against gas produced within the State and have interstate commerce pay its way for the services provided by the State upon taxable incidences occurring solely within the State of Louisiana.

The First Use Tax in conjunction with the Severance Tax Credit[12] does not discriminate against interstate commerce in that all gas used in Louisiana, whether ultimately consumed outside of the State, now has the same tax liability. Tax credits are valid enactments of State Legislatures and only if they place an undue burden on interstate commerce are they subject to attack. Producers of natural gas subject to the Louisiana Severance Tax are granted a credit up to the amount of said severance tax, however, they are liable for the tax and should their severance tax liability be reduced, by non-production or lower severance taxes, then the First Use Tax becomes due and owing.

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12. La. R.S. 47:647, as enacted by Act No. 293 of 1978.

5. THE LOUISIANA FIRST USE TAX IS FAIRLY RELATED TO SERVICES PROVIDED BY LOUISIANA

Since offshore development started in Louisiana in the 1950's, all State services have been provided for the product and owners (agents, employees, corporations, etc.) thereof at the sole expense of the State without adequate compensation for the State services and the damage to the State.

A 1974 study conservatively concluded that State and Local Government in Louisiana was incurring a net loss of 40 million dollars a year as a result of the governmental services required and provided for outer continental shelf development.[13] This same study revealed that in 1970, there were 1,303 producing wells located offshore Louisiana in the federal domain of the Outer Continental Shelf compared to 322 producing gas wells within the offshore jurisdiction of Louisiana. All of the gas marketed from these Outer Continental Shelf wells is transported to shore in Louisiana, and, ultimately, approximately 98-½% is transported out of State through a network of pipelines which necessitated the digging and use of hundreds of canals and pipeline trenches in the fragile coastal marshes and across the barrier islands of the State.

Through shoreline and barrier island erosion it is estimated that Louisiana is losing a tangible unit of sixteen square miles of land annually,[14] with an optimum economic replacement value of 800 million dollars.[15] Roughly 40% of this land loss has been attributed to these canals, trenches and spoil banks which serve the marketers of Outer Continental Shelf gas.[16]

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13. Offshore Revenue Sharing: An analysis of offshore operations on coastal states: By Gulf South Research Institute, Project XS-614, 1974.
14. Cumulative Impact Studies in the Louisiana Coastal Zone: Eutrophication, Land Loss: (N.J. Craig; J.W. Day, Jr., 1977).
15. The Value of the Tidal Marsh (Gosselink, Odum and Pope, 1974).
16. Cumulative Impact Studies in the Louisiana Coastal Zone: Eutrophication, Land Loss (supra).

As can be seen a large factual basis must be established, and can well be done, to value the services provided by the State as respects the value of the tax. It is time for the industry to bear its fair share of all state services rendered in behalf of the industry.

B. THE LOUISIANA FIRST USE TAX DOES NOT VIOLATE THE SUPREMACY CLAUSE

No federal preemption can be shown which prohibits a State from imposing a lawful tax upon natural gas activities within the boundaries of the imposing State.

The Natural Gas Policy Act of 1978 specifically recognizes States' rights to tax natural gas; any change from the tax structure in effect on December 31, 1978, must be uniformily applied to all natural gas. The First Use Tax was enacted in July, 1978.

The Outer Continental Shelf Lands Act prohibits State Taxation within the territorial limits of the Outer Continental Shelf, however, all taxable incidents of the First Use Tax are within the boundaries of the State of Louisiana, and are not prohibited by said Act. Natural gas after leaving the federal domain is no longer immune from State Taxation.

C. THE LOUISIANA FIRST USE TAX IS NOT AN IMPOST OR DUTY ON IMPORTS.

> ". . . there is hereby levied and imposed a tax upon the first occurrence within this state of any use, . . ., of any natural gas . . . which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country. . . ." La. R.S. 47:1303A

Clearly under Article 1, Section 10, Clause 2 of the United States Constitution *only* the federal

government may levy an impost or duty on imports. This taxing authority over imports subjects all natural gas imported from a foreign country to a levy of a federal impost or duty. Being subject to such a levy exempts all natural gas imported from a foreign country from the imposition of the Louisiana First Use Tax because of its character as an import, whether or not such levy is actually imposed.

The First Use Tax does not offend any of the standards or policy considerations set forth in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). The tax does not and cannot reach natural gas imported from a foreign country. Thus, foreign policy of the nation is not affected, no federal import revenues are affected and the harmony between the states is not upset when commerce pays for the governmental services it enjoys.

D. THE LOUISIANA FIRST USE TAX DOES NOT UNCONSTITUTIONALLY IMPAIR THE OBLIGATION OF CONTRACTS

Contracts may be modified or altered by State Law "upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977); *Allied Structural Steel v. Spannaus*,_____U.S._____, 57 L.Ed 2d 727 (1978); and *City of El Paso v. Simmons*, 379 U.S. 497 (1965).

The exercise of the police power of the State is not an unlimited power to modify private contracts but rather a reasonable and appropriate exercise of a State's police power which modifies or alters contracts does not violate the Contract Clause, Article I, Section 10, Clause 1 of the United States Constitution.

The First Use Tax, as respects the policy of declaring certain provisions of contracts unenforceable, meets the test set forth in *Spannaus*, supra. The owner as taxpayer should bear the tax burden of allowing its product to be used within the State. The Federal Energy Regulatory Commission has already established a fully-passed-on cost, by Rule (see footnote 2, supra), of the First Use Tax. By allowing the pass-on there is no contract clause problem.

E. THE FIRST USE TAX DOES NOT DENY EQUAL PROTECTION OF THE LAWS.

The First Use Tax applies to all owners of natural gas, as defined by law, wherein an identifiable first use is within the boundaries of this State. Tax credits and exemptions are valid exercises of the tax powers of a State. Different classification of taxpayers are permissible as well as separate classifications for the levy of a tax.

To withstand an equal protection argument the distinction made must be "rationally related to furthering a legitimate State interest." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).

The First Use Tax is not applied unequally, it is applied to all natural gas subject to the tax regardless of any other factors. Certain credits may reduce the individual tax liability of some taxpayers, however this is insufficient to say there is a denial of equal protection of the laws.

CONCLUSION

Plaintiff States have not stated a controversy "between two or more states", nor have they established sufficient standing in any respect as to warrant the exercise of the exclusive, original jurisdiction of this Court. The validity of a state tax should not be initially litigated with this Court as the principal forum. Furthermore, the tax in question does not offend federal statutes and is a justifiable exercise of the police powers of the State of Louisiana.

If the court should accept jurisdiction, which is not urged, over plaintiffs' Complaint, Louisiana would move the Court to consider staying any further proceedings in this case until appeal of the State case to this Court has been perfected, or until the Federal action is in the posture for consideration by this Court for review. Such action would be particularly appropriate in order to avoid triplicate effort in three forums.

Plaintiff States' Motion should be denied.

Respectfully submitted:

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Certificate of Service

I HEREBY CERTIFY that I have this day mailed, postage prepaid, the foregoing to all opposing counsel.

Baton Rouge, Louisiana, this_____day of May, 1979.

_____
CARMACK M. BLACKMON

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Number 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

VERSUS

STATE OF LOUISIANA,

Defendant

ANSWER

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August 17, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

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STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

VERSUS

STATE OF LOUISIANA,

Defendant

ANSWER

The State of Louisiana, defendant, for its answer to the complaint heretofore filed in the above captioned cause, admits, denies, and alleges as follows:

I.

For answer to paragraph I of plaintiffs' complaint, Louisiana denies that the original jurisdiction of this Court is properly invoked herein. Further answering, Louisiana contends that plaintiffs have available to them, by way of intervention, an appropriate forum in which the issues tendered here may be litigated.

II.

For answer to paragraph II of plaintiffs' complaint, Louisiana contends that no answer is deemed necessary to the paragraph but, if an answer would be necessary or helpful, Louisiana shows that the statutes themselves are the best and only legally admissible evidence of their contents. Louisiana denies that any of plaintiffs' constitutional rights or protections have been violated or that an injunction is appropriate or necessary.

III.

For answer to paragraph III of plaintiffs' complaint, the capacity and legal status of the plaintiffs are admitted but each and every other allegation in paragraph III is denied. Plaintiffs' standing is challenged to assert this action either in their proprietary capacity or as parens patriae on behalf of their respective citizens, for the reasons heretofore and hereinafter asserted. Louisiana alleges that it is without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegations that plaintiffs are substantial purchasers of gas affected by the First Use Tax or about any monetary damages which may be suffered by plaintiffs as a result of the tax.

IV.

For answer to paragraph IV of plaintiffs' complaint, Louisiana admits that it is the defendant.

V.

For answer to paragraph V of plaintiffs' complaint, Louisiana contends that the paragraph is no more than a reference to a portion of the Louisiana First Use Tax Statute. Louisiana again avers that the statute in question in its entirety is the only legally admissible proof of its contents and denies any allegation which would alter, amend, extend, or vary the statute either in language, meaning, or in context.

VI.

For answer to paragraph VI of plaintiffs' complaint, Louisiana shows that the quoted language is no more than an excerpt from Louisiana's First Use Tax Statute.

VII.

For answer to paragraph VII of plaintiffs' complaint, Louisiana contends that this paragraph merely quotes and paraphrases portions of Louisiana's First Use Tax Statute.

VIII.

For answer to paragraph VIII of plaintiffs' complaint, Louisiana contends that the paragraph is no more than a reference to a portion of the Louisiana First Use Tax Statute. Louisiana again avers that the statute in question in its entirety is the only legally admissible proof of its contents and denies any allegation which would alter, amend, extend, or vary the statute either in language, meaning, or in context.

IX.

For answer to paragraph IX of plaintiffs' complaint, Louisiana contends that the paragraph is no more than a reference to a portion of the Louisiana First Use Tax Statute. Louisiana again avers that the statute in question in its entirety is the only legally admissible proof of its contents and denies any allegation which would alter, amend, extend, or vary the statute either in language, meaning, or in context.

X.

For answer to paragraph X of plaintiffs' complaint, each and every allegation of the paragraph as stated is denied. Futher answering, Louisiana shows that its First Use Tax has no more of a national significance or effect than any other state's validly adopted revenue method.

XI.

For answer to paragraph XI of plaintiffs' complaint, Louisiana denies each and every allegation of the paragraph and further shows that its First Use Tax Statute is the best evidence as to the persons liable for the payment of any tax imposed upon specified uses occurring within the State of Louisiana.

XII.

For answer to paragraph XII of plaintiffs' complaint, Louisiana denies each and every allegation of the paragraph.

XIII.

For answer to paragraph XIII of plaintiffs' complaint, Louisiana contends that the cases, orders, and proceedings mentioned in the paragraph are themselves the best evidence of their content.

XIV.

For answer to paragraph XIV of plaintiffs' complaint, Louisiana alleges that it is without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegations; Louisiana contends that its First Use Tax is but one element of cost attributable to consumers of gas.

XV.

For answer to paragraph XV of plaintiffs' complaint, Louisiana denies that either the plaintiff states or their citizens will be subject to the tax and avers on the contrary that it is only the statutory uses of the gas within the State of Louisiana which are the subject of the tax. Further, Louisiana contends that the economic impact upon plaintiff states or their citizens is the same as flows from any tax imposed by any state affecting any commodity. Louisiana alleges that it is without knowl-

edge or information sufficient to form a belief as to the truth of plaintiffs' allegations concerning which gas pipeline companies deliver gas to plaintiffs.

XVI.

For answer to paragraph XVI of plaintiffs' complaint, Louisiana alleges that it is without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegations in the paragraph. In this connection, Louisiana further avers that the ultimate cost to the plaintiff states or their citizens is irrelevant because any tax imposed by any state on any commodity affects economically all other using or consuming states and their citizens. This truism has no bearing upon the constitutionality of this tax or other similar taxes.

XVII.

For answer to paragraph XVII of plaintiffs' complaint, Louisiana alleges that it is without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegations in the paragraph. In this connection, Louisiana further avers that the ultimate cost to the plaintiff states or their citizens is irrelevant because any tax imposed by any state on any commodity affects economically all other using or consuming states and their citizens. This truism has no bearing upon the constitutionality of this tax or other similar taxes.

XVIII.

For answer to paragraph XVIII of plaintiffs' complaint, Louisiana alleges that it is without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegations in the paragraph. In this connection, Louisiana further avers that the ultimate cost to the plaintiff states or their citizens is irrelevant because any tax imposed by any state on any commodity affects economically all other using or consuming

states and their citizens. This truism has no bearing upon the constitutionality of this tax or other similar taxes.

XIX.

For answer to paragraph XIX of plaintiffs' complaint, Louisiana alleges that it is without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegations in the paragraph. In this connection, Louisiana further avers that the ultimate cost to the plaintiff states or their citizens is irrelevant because any tax imposed by any state on any commodity affects economically all other using or consuming states and their citizens. This truism has no bearing upon the constitutionality of this tax or other similar taxes.

XX.

For answer to paragraph XX of plaintiffs' complaint, Louisiana alleges that it is without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegations in the paragraph. In this connection, Louisiana further avers that the ultimate cost to the plaintiff states or their citizens is irrelevant because any tax imposed by any state on any commodity affects economically all other using or consuming states and their citizens. This truism has no bearing upon the constitutionality of this tax or other similar taxes.

XXI.

For answer to paragraph XXI of plaintiffs' complaint, Louisiana alleges that it is without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegations in the paragraph. In this connection, Louisiana further avers that the ultimate cost to the plaintiff states or their citizens is irrelevant because any tax imposed by any state on any commodity affects economically all other using or consuming states and their citizens. This truism has no bearing upon the constitutionality of this tax or other similar taxes.

XXII.

For answer to paragraph XXII of plaintiffs' complaint, Louisiana alleges that it is without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegations in the paragraph. In this connection, Louisiana further avers that the ultimate cost to the plaintiff states or their citizens is irrelevant because any tax imposed by any state on any commodity affects economically all other using or consuming states and their citizens. This truism has no bearing upon the constitutionality of this tax or other similar taxes.

XXIII.

For answer to paragraph XXIII of plaintiffs' complaint, Louisiana alleges that it is without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegations in the paragraph. In this connection, Louisiana further avers that the ultimate cost to the plaintiff states or their citizens is irrelevant because any tax imposed by any state on any commodity affects economically all other using or consuming states and their citizens. This truism has no bearing upon the constitutionality of this tax or other similar taxes.

XXIV.

For answer to paragraph XXIV of plaintiffs' complaint, Louisiana alleges that it is without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegations in the paragraph. In this connection, Louisiana further avers that the ultimate cost to the plaintiff states or their citizens is irrelevant because any tax imposed by any state on any commodity affects economically all other using or consuming states and their citizens. This truism has no bearing upon the constitutionality of this tax or other similar taxes.

XXV.

For answer to paragraph XXV of plaintiffs' complaint, Louisiana alleges that it is without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegations in the paragraph. In this connection, Louisiana further avers that the ultimate cost to the plaintiff states or their citizens is irrelevant because any tax imposed by any state on any commodity affects economically all other using or consuming states and their citizens. This truism has no bearing upon the constitutionality of this tax or other similar taxes.

XXVI.

For answer to paragraph XXVI of plaintiffs' complaint, Louisiana alleges that it is without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegations in the paragraph. In this connection, Louisiana further avers that the ultimate cost to the plaintiff states or their citizens is irrelevant because any tax imposed by any state on any commodity affects economically all other using or consuming states and their citizens. This truism has no bearing upon the constitutionality of this tax or other similar taxes.

XVII.

For answer to paragraph XXVII of plaintiffs' complaint, Louisiana alleges that it is without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegations in the paragraph. In this connection, Louisiana further avers that the ultimate cost to the plaintiff states or their citizens is irrelevant because any tax imposed by any state on any commodity affects economically all other using or consuming states and their citizens. This truism has no bearing upon the constitutionality of this tax or other similar taxes.

XXVIII.

For answer to paragraph XXVIII of plaintiffs' complaint, Louisiana alleges that it is without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegations in the paragraph. In this connection, Louisiana further avers that the ultimate cost to the plaintiff states or their citizens is irrelevant because any tax imposed by any state on any commodity affects economically all other using or consuming states and their citizens. This truism has no bearing upon the constitutionality of this tax or other similar taxes.

XXIX.

For answer to paragraph XXIX of plaintiffs' complaint, Louisiana alleges that it is without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegations in the paragraph. In this connection, Louisiana further avers that the ultimate cost to the plaintiff states or their citizens is irrelevant because any tax imposed by any state on any commodity affects economically all other using or consuming states and their citizens. This truism has no bearing upon the constitutionality of this tax or other similar taxes.

XXX.

For answer to paragraph XXX of plaintiffs' complaint, Louisiana alleges that it is without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegations in the paragraph. In this connection, Louisiana further avers that the ultimate cost to the plaintiff states or their citizens is irrelevant because any tax imposed by any state on any commodity affects economically all other using or consuming states and their citizens. This truism has no bearing upon the constitutionality of this tax or other similar taxes.

XXXI.

For answer to paragraph XXXI of plaintiffs' complaint, Louisiana alleges that it is without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegations in the paragraph. In this connection, Louisiana further avers that the ultimate cost to the plaintiff states or their citizens is irrelevant because any tax imposed by any state on any commodity affects economically all other using or consuming states and their citizens. This truism has no bearing upon the constitutionality of this tax or other similar taxes.

XXXII.

For answer to paragraph XXXII of plaintiffs' complaint, Louisiana alleges that it is without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegations in the paragraph. In this connection, Louisiana further avers that the ultimate cost to the plaintiff states or their citizens is irrelevant because any tax imposed by any state on any commodity affects economically all other using or consuming states and their citizens. This truism has no bearing upon the constitutionality of this tax or other similar taxes.

XXXIII.

For answer to paragraph XXXIII of plaintiffs' complaint, Louisiana contends that no answer is necessary to the paragraph but, if an answer is deemed necessary or helpful, Louisiana answers paragraph XXXIII by adopting all of its answers previously set forth in paragraphs 1—XXXII.

XXXIV.

For answer to paragraph XXXIV of plaintiffs' complaint, Louisiana denies that the First Use Tax constitutes an unconstitutional burden on interstate commerce or that it vio-

lates in any respect the commerce clause or any other clause of the United States Constitution. Louisiana affirmatively alleges that the tax does not burden natural gas moving in interstate commerce and is in fact applied to activities which occur within Louisiana's boundaries and have a substantial nexus with the state, is fairly apportioned, does not discriminate against interstate or foreign commerce and is fairly related to the cost burdens imposed upon Louisiana by the subject of the tax and directly related to the value of the benefits and services provided by the state. Therefore, Louisiana specifically denies each and every allegation of this paragraph and affirmatively avers that the First Use Tax meets all constitutional objections raised herein by the plaintiffs.

XXXV.

For answer to paragraph XXXV of plaintiffs' complaint, Louisiana denies the interstate character of the gas the use of which is subject to the First Use Tax. Louisiana contends that the uses defined in the First Use Tax Law occur prior to the inception of interstate commerce. The activities described as uses by the statute constitute significant and necessary activities prior to the marketing of natural gas, are not integral to the movement of such gas through the State of Louisiana and are not performed at any point in the interstate commerce stream. The tax is imposed on the uses defined in the statute and not upon the privilege of transporting the product in interstate commerce; the uses described are unique to the services performed in Louisiana and constitute significant and necessary activities in the refinement, processing, storing, and transformation of the gas into a marketable commodity for ultimate consumption.

XXXVI.

For answer to paragraph XXXVI of plaintiffs' complaint, Louisiana denies each and every allegation of the para-

graph and avers that the nature of, and necessity for, the uses involved establishes a sufficient and adequate connection with the State of Louisiana to justify the imposition of a First Use Tax. None of the language of the act is vague or uncertain; instead, the statute clearly establishes an adequate constitutional nexus with the State of Louisiana to justify and uphold its clarity and validity.

XXXVII.

For answer to paragraph XXXVII of plaintiffs' complaint, Louisiana denies each and every allegation of the paragraph and avers on the contrary that the First Use Tax is fairly apportioned, is imposed on certain local uses described therein which fairly relate to the transformation and improvements made in the product and are directly connected with facilities, investment, business activities, and other direct connections with the State of Louisiana, including tax exemptions, transformation in quality of the product, and maintenance of the same in storage facilities. The tax is imposed directly on certain statutorily defined uses and not on the natural gas itself; indeed, Section 1303(e) of the First Use Tax specifically provides that it shall not be construed "as imposing any tax on the production, severance or ownership of natural gas produced outside the boundaries of the State of Louisiana . . ." Further, the statute in question makes crystal clear "that the incidence of this tax shall not be upon the natural gas nor upon the property or rights from which it is produced, but rather shall only be upon the privilege of performance or allowing the performance by the owner of the enumerated actions comprising first use within the state."

XXXVIII.

For answer to paragraph XXXVIII of plaintiffs' complaint, Louisiana denies the relevancy of all of plaintiffs' pre-

sumptive allegations in connection with actions which other states may take. Louisiana further avers that the uses taxed are unique and peculiar to Louisiana as the first state of entry and involve the necessary preparation of the product in question for transportation and ultimate consumption. Thereafter, no similar activities are, or need be, performed within another state. Louisiana consequently denies both the relevancy and factual accuracy of each and every allegation in paragraph XXXVIII of plaintiffs' complaint.

XXXIX.

For answer to paragraph XXXIX of plaintiffs' complaint, the Louisiana First Use Tax does not discriminate against interstate commerce; instead, it represents a legal, valid, and constitutional exercise of Louisiana's power to tax the uses and incidents as described in the statute.

XL.

For answer to paragraph XL of plaintiffs' complaint, the First Use Tax does not discriminate against interstate commerce because an equivalent tax is in fact imposed as a severance tax upon all gas produced within the State of Louisiana and sold there or elsewhere. Moreover, any OCS gas to which the First Use Tax applies which is sold and consumed in Louisiana bears an equal share of the First Use Tax with the plaintiff states and others involved in the interstate commerce stream. Louisiana again denies that the gas taxed by the First Use Tax is moving in interstate or foreign commerce at the time it is transported into Louisiana, and denies that this gas continues in interstate commerce, without interruption, until it is transported out of Louisiana or sold at wholesale for ultimate consumption within Louisiana.

XLI.

For answer to paragraph XLI of plaintiffs' complaint, Louisiana avers the First Use Tax and the various credits, exemptions or adjustments allowed under that statute do not discriminate because:

(a) The tax falls uniformly on all taxpayers liable for the tax;

(b) The discrimination or disadvantage that has long been borne by owners of gas produced within the territorial boundaries of Louisiana is removed by taxing the owners of gas which is used in Louisiana, but which, prior to introduction into the territorial boundaries of the State of Louisiana, is not otherwise subject to a severance tax, tax on volume of production, or characterization as an import;

(c) A reasonable, rational allocation of the tax burden upon owners of natural gas is provided thereby, ensuring that owners of natural gas already subjected to and bearing a severance tax, a tax on volume of production, or characterization as an import, are not subjected to an onerous tax burden;

(d) The conferring of similar credits, exemptions or adjustments based on subsequent events occurring beyond the taxing jurisdiction of the State would not be feasible for such events are beyond the authority of the State to regulate in furtherance of its pronounced public policy and such events are not susceptible, as a practical matter, to adequate policing to insure verification; and

(e) Taxes on local activities which affect the cost of products reaching interstate commerce are ultimately borne by non-local consumers; this does not render the local tax invalid.

XLII.

For answer to paragraph XLII of plaintiffs' complaint, Louisiana admits a statutory exemption contained in the First Use Tax for natural gas used or consumed in the manufacture of fertilizer and anhydrous ammonia but denies that this exemption renders the act unconstitutional. Such exemptions are entirely within the scope of legislative prerogative and represent fair and proper inducements for the manufacture of products sorely needed by the State of Louisiana and by the agricultural community throughout the United States. Such exemptions are supported by sound public purpose and the proper exercise of legislative discretion and do not discriminate or render the act in question unconstitutional. Furthermore, Louisiana now avers the provision of Section 2 of the act which provides in essence that the invalidity of any item or provision of the act shall not affect other provisions, items or application, and that the provisions of the act are severable.

XLIII.

For answer to paragraph XLIII of plaintiffs' complaint, the tax is fairly related to its express purpose, as will be shown more fully upon the evidentiary hearing requested herein. The production, transportation, metering, interchange, refinement, and processing facilities necessary to accomplish the uses made the subject of the tax have for many years produced meaningful, significant, and irreversible effects upon Louisiana's waterbottom, barrier reefs, and sensitive shorelines. These facilities have also caused hazards and exposures to Louisiana's environment and to the safety of her citizens. Furthermore, Louisiana is losing a tangible unit in excess of sixteen square miles of land annually; a substantial portion of this land loss is attributable to the existence of canals, trenches, and spoil banks made to serve the owners and marketers of the gas in question. Although Congress has recognized these problems and has

adopted the Coastal Energy Impact Program to fund maintenance and construction projects designed to offset the adverse impact suffered by coastal states affected by energy development necessary to supply the demands of the entire nation, Congress has not adequately funded these programs. Presently Louisiana has in excess of $500,000,000 in impacts which could qualify for coastal energy impact program funds but which cannot be received due to insufficient federal appropriations and grant allocation formula criteria. Louisiana has experienced net losses in excess of $40,000,000 annually expended on government services required for the OCS development. Therefore, Louisiana avers on the contrary to the plaintiffs's allegations that there is a fair, accurate, and reasonable relationship between the First Use Tax and the costs, burdens, and impacts now being suffered by Louisiana. Louisiana users pay a severance tax equivalent in amount to that of the First Use Tax. Finally, although no similar tax is imposed on other forms of transportation, such as barges and shipping, this fact is without relevance to this controversy as it is addressed to sound legislative discretion and not to judicial inquiry.

XLIV.

For answer to paragraph XLIV of plaintiffs' complaint, Louisiana admits that the First Use Tax is imposed at the same rate as the Louisiana severance tax. For all the reasons set forth in the preceding paragraph [paragraph XLIII] and as will be demonstrated more fully and clearly during the hearing to be had herein, the economic impact sought to be redressed by the imposition of the First Use Tax is substantially larger than that involved in the intrastate severance tax.

XLV.

For answer to paragraph XLV of plaintiffs' complaint, Louisiana again alleges that the First Use Tax is directly re-

lated and reasonably apportioned to the impact of the activity in question upon the State of Louisiana and, in fact, bears a rational relationship to the activities, impacts, detriments, and benefits relating to the entire industry in question. In this connection, Louisiana further shows that these factual controversies underscore the need for an evidentiary hearing to demonstrate the direct relationship between the First Use Tax and the activities giving rise thereto, measure the adverse impact of such activities on the shorelines and environment of Louisiana, and determine the costs to state and local government in support of these activities.

XLVI.

For answer to paragraph XLVI of plaintiffs' complaint, Louisiana believes that no answer is necessary to that paragraph but, if an answer is deemed necessary or helpful, Louisiana answers paragraph XLVI by adopting all of its answers previously set forth in paragraphs I—XXXII.

XLVII.

For answer to paragraph XLVII of plaintiffs' complaint, Louisiana believes that this paragraph is merely a legal conclusion on the part of the plaintiffs and, therefore, requires no answer. However, if an answer is necessary or helpful, Louisiana avers that the First Use Tax is not in conflict with or repugnant to any constitutional provision, statute, or regulation and, consequently, is a legal, valid, and proper exercise of Louisiana's police and taxing powers.

XLVIII.

For answer to paragraph XLVIII of plaintiffs' complaint, the First Use Tax is not an attempted regulation of gas dedicated to interstate commerce and does not conflict with any rule, regulation, or jurisdictional authority of the Department

of Energy or FERC. None of the federal statutes cited in plaintiffs' complaint prohibit or preempt the right of a state to impose a tax on local activities.

XLIX.

For answer to paragraph XLIX of plaintiffs' complaint, the First Use Tax does not conflict with any federal statute and does not violate any portions, aspects, or combinations of federal acts; on the contrary, it is a proper exercise of Louisiana's police and taxing powers on operations conducted entirely within the boundaries of the State of Louisiana. The statutory citations contained in plaintiffs' petition in no way prohibit the State of Louisiana from taxing local incidents that have some connection with subsequent interstate activities under the regulatory jurisdiction of any federal agency. Louisiana also denies that the federal statutes cited constitute such a comprehensive scheme as to preempt Louisiana from adopting a first use tax.

L.

For answer to paragraph L of plaintiffs' complaint, the statutes, both federal and state, speak for themselves and the individual contracts are the best evidence of their contents. As these contracts differ substantially in form and meaning, and are made between various parties with differing consequences, plaintiffs cannot facilely assume the tax's effect on gas contracts.

LI.

For answer to paragraph LI of plaintiffs' complaint, the First Use Tax is not imposed on the production, severance, or ownership of *natural gas* but only upon the performance of certain specific uses within the State of Louisiana. Hence it does not violate the Outer Continental Shelf Lands Act.

LII.

For answer to paragraph LII of plaintiffs' complaint, Louisiana believes that no answer is necessary to that paragraph but, if an answer is deemed necessary or helpful, Louisiana answers paragraph LII by adopting all of its answers previously set forth in paragraphs I—XXXII.

LIII.

For answer to paragraph LIII of plaintiffs' complaint, Louisiana denies that the First Use Tax applies to gas imported into Louisiana from a foreign country and, therefore, denies that the statute contravenes or violates the constitutional provision mentioned in this paragraph.

LIV.

For answer to paragraph LIV of plaintiffs' complaint, Louisiana denies the allegations of this paragraph and affirmatively avers that the First Use Tax does not apply to any gas imported into Louisiana from a foreign country.

LV.

For answer to paragraph LV of plaintiffs' complaint, Louisiana denies both the facts and legal conclusions contained in this paragraph. Clearly under Article I, Section 10, Clause 2 of the United States Constitution, only the federal government may levy an impost or duty on imports. This taxing authority over imports subjects all natural gas imported from a foreign country to a levy of a federal impost or duty. Being subject to such a levy exempts all natural gas imported from a foreign country from the imposition of the Louisiana First Use Tax because of the gas' character as an import, whether or not any federal levy is actually imposed.

LVI.

For answer to paragraph LVI of plaintiffs' complaint, as the First Use Tax does not apply to the importation of foreign products, Louisiana denies that the foreign trade policy of the federal government will be complicated by the tax.

LVII.

For answer to paragraph LVII of plaintiffs' complaint, Louisiana profoundly hopes and therefore alleges that its First Use Tax will not disturb the harmony among the states. The tax is imposed upon substantial activities conducted within the boundaries of Louisiana which have a significant economic, environmental and safety impact upon the State of Louisiana and all of its citizens; the tax is fairly related to the purposes sought to be compensated and to the cost of government in maintaining and supporting the industry in question. Moreover, the First Use Tax is paid by Louisiana citizens who use this gas at the same rate as the citizens of any other state. As a matter of fact, whether the gas originates in the OCS or in Louisiana, the tax rate is the same — seven cents per thousand cubic feet. Louisiana therefore alleges that its First Use Tax is just, fair, and indiscriminate and that the citizens of other states should bear their fair proportion of the cost of maintaining the industry which provides our nation with a substantial portion of its energy at rates equivalent to those paid by Louisiana citizens and reasonably connected with the costs, risks, and hazards imposed upon Louisiana and her inhabitants.

LVIII.

For answer to paragraph LVIII of plaintiffs' complaint, Louisiana denies that the First Use Tax is a direct tax on imports in transit.

LIX.

For answer to paragraph LIX of plaintiffs' complaint, Louisiana believes that no answer is necessary to that paragraph but, if an answer is deemed necessary or helpful, Louisiana answers paragraph LIX by adopting all of its answers previously set forth in paragraphs I—XXXII.

LX.

For answer to paragraph LX of plaintiffs' complaint, Louisiana denies that any contract has been voided by the First Use Tax and alleges on the contrary that the sole purpose, intent, and application of the statutory language quoted in this paragraph has been to ensure that the First Use Tax will not unreasonably burden any person within the interstate commerce stream but will be passed along to the ultimate users and consumers. Because the tax will be borne by the ultimate users and consumers, neither party to the contracts in question suffers.

LXI.

For answer to paragraph LXI of plaintiffs' complaint, Louisiana believes that no answer is necessary to that paragraph but, if an answer is deemed necessary or helpful, Louisiana answers paragraph LXI by adopting all of its answers previously set forth in paragraphs I—XXXII.

LXII.

For answer to paragraph LXII of plaintiffs' complaint, Louisiana denies that plaintiff states and their citizens are denied equal protection of the law and alleges on the contrary that they are merely asked to bear their fair portion of the cost of supporting an industry which provides them with a major source of energy.

LXIII.

For answer to paragraph LXIII of plaintiffs' complaint, Louisiana denies each and every allegation of the paragraph.

LXIV.

For answer to paragraph LXIV of plaintiffs' complaint, Louisiana contends that the paragraph is no more than a reference to a statute relating to a severance tax credit. Further answering, Louisiana shows that this provision is in complete harmony with Congress's intent and purpose in adopting the Natural Gas Policy Act and particularly §110 thereof.

LXV.

For anwser to paragraph LXV of plaintiffs' complaint, Louisiana denies each and every allegation of the paragraph.

LXVI.

For answer to paragraph LXVI of plaintiffs' complaint, each and every allegation of the paragraph as stated is denied.

Further answering, Louisiana shows the statutes mentioned in paragraph LXVI of the complaint are separate and distinct, neither relying for its validity on a constitutional interpretation of the other. Tax credits are reflective of Louisiana's continuing attempt to attract industry and thereby encourage development of Louisiana's natural resources. The severance tax credit is allowed on a priority basis upon the various minerals involved. The credit for gas is not currently permitted. At such time as it may be permitted, the priority will be so low that, from a practical standpoint, there is little likelihood that the credit will ever be applicable. Indeed, if the intent of Congress as evidenced in Section 110 of the Natural Gas Policy Act of 1978 is carried out by the Federal Energy Regulatory Commission, the flow-through concept fashioned by Congress in that Act will prevent any application of the tax credit.

All taxpayers liable for the First Use Tax are classified and taxed on an equal basis. The severance tax credit is allowable for any taxpayer subjected to a Louisiana severance tax. There exists no unreasonable classification because all taxpayers are treated equally and on the same basis; that is, all must pay the First Use Tax and all may claim the severance tax credit where applicable.

The severance tax credit allowed against severance taxes due Louisiana is a valid exercise of the police and taxing powers of the State. It prohibits the levying of an onerous tax burden upon taxpayers who have been compensating the State for services and benefits received and for adverse effects caused.

LXVII.

Further answering, Louisiana alleges that plaintiff states are without standing to institute and prosecute this action, and this Court has no original jurisdiction of this cause, all for the reasons set forth in Louisiana's brief in opposition to plaintiffs' motion for leave to file complaint herein. Plaintiff states have other judicial remedies available to them by way of intervention in pending legal proceedings in the courts of Louisiana through which the issues sought to be raised here may be fully litigated and, if necessary, ultimately brought to this Court by direct appeal.

LXVIII.

Louisiana further asserts that the original jurisdiction of this Court should be invoked only sparingly in order that this Honorable Court should not become the potential principal forum for settling the frequent controversies between residents of different states concerning the multitude of disputes over possible applications of various state laws.

LXIX.

In the alternative, however, and only in the event this Honorable Court should determine to pursue jurisdiction in this case, then Louisiana avers that the First Use Tax represents a legal, valid, and constitutional exercise of the police and taxing power of the state and does not violate or conflict with any provision of the United States Constitution or any laws, rules, regulations, or scheme of legislation of the federal government.

LXX.

Further in the alternative, Louisiana avers that many factual controversies have been raised by the pleadings herein and extensive evidentiary hearings will be necessary to hear and receive proof and facts in support thereof. Louisiana expects to offer considerable evidence in support of its allegations and in opposition to the factual arguments made by plaintiffs; particularly, Louisiana expects to offer competent evidence of the factual basis for its defense in order to prove:

(1) The close connection between the activities being taxed and the State of Louisiana;

(2) The nature and extent of environmental damage sustained by Louisiana as a consequence of the taxed activity associated with the preparation for marketing of the affected gas;

(3) The additional and substantial costs and burdens imposed upon state and local government as a consequence of the activities necessary to develop and market the gas affected by the tax;

(4) The non-discriminating character of the tax in question;

(5) A rational and reasonable basis and public policy in support of the First Use Tax, its stimulation of energy production, and its fair contribution to the support of the costs, burdens, risks, and hazards necessarily resulting to Louisiana or any other state of first entry of OCS gas;

(6) The nature of and necessity for the taxed activities prior to marketing of the gas for ultimate consumption;

(7) That the gas affected by the tax is not in interstate commerce at the time of occurrence of any local use taxed; and

(8) That the tax in question has no effect on gas characterized as an import from a foreign country.

Louisiana, having fully answered the complaint herein, prays this Court to enter a judgment that plaintiff states are without standing to institute and prosecute this action and that this Court has no original jurisdiction concerning this cause; that if such jurisdiction does lie, Louisiana's accompanying motion for the appointment of a special master be granted; and that in due course the demands of the plaintiff states be rejected at their costs and that Louisiana be granted such other relief as it may be entitled to in the premises.

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CERTIFICATE OF SERVICE

I, ROBERT G. PUGH, one of the attorneys for the State of Louisiana in the above-entitled proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that, on the 17th day of August, 1979, I served copies of the answer, by mailing three copies thereof in duly addressed envelopes, with postage prepaid, to:

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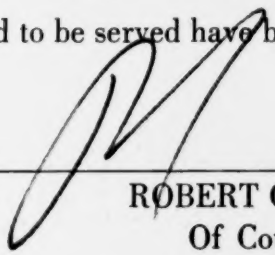

ROBERT G. PUGH
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

MOTION FOR JUDGMENT ON THE PLEADINGS AND BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

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APPENDIX:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

MOTION FOR JUDGMENT ON THE PLEADINGS

The State of Maryland, the State of Illinois, the State of Indiana, the Commonwealth of Massachusetts, the State of Michigan, the State of New York, the State of Rhode Island and Providence Plantations, and the State of Wisconsin ("the plaintiff states"), by their undersigned attorneys, move the Court for judgment on the pleadings, and in support of this motion state:

1. On June 18, 1979, the Court granted the motion of the plaintiff states for leave to file their complaint and ordered the defendant State of Louisiana to answer within sixty days.

2. The defendant filed its answer on August 17, 1979.

3. As more fully appears from the accompanying brief, there is no genuine issue as to any material fact,

and the plaintiff states are entitled to judgment on the pleadings as a matter of law.

WHEREFORE, the plaintiff states request that the Court grant this motion and enter judgment as prayed in their complaint.

Respectfully submitted,

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STATE OF MARYLAND,
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STATE OF RHODE ISLAND AND
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STATE OF WISCONSIN,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

JURISDICTION

This is a suit between sovereign states, and, as such, it is within the exclusive original jurisdiction of this Court under article III, section 2, clauses 1 and 2 of the Constitution of the United States and section 1251(a)(1) of title 28 of the United States Code.

On June 18, 1979, the Court entered an order granting the motion for leave to file complaint.

QUESTIONS PRESENTED

1. Whether the Louisiana First Use Tax violates the supremacy clause of the United States Constitution and should be enjoined because it interferes with or impermissibly affects the comprehensive federal statutory schemes and dominant purposes of the Natural Gas Act, the Natural Gas Policy Act, and the Outer Continental Shelf Lands Act?

2. Whether the Louisiana First Use Tax contravenes the commerce clause of the United States Constitution and should be enjoined because it discriminates against interstate commerce and is not fairly apportioned?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article I, section 8, clause 3 of the Constitution of the United States provides as follows:

> The Congress shall have Power . . . To regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes.

2. Article VI, clause 2 of the Constitution of the United States provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. The First Use Tax on Natural Gas, La. Rev. Stat. Ann. §§ 47:1301-1307 (West Supp. 1979), is set out in full in the Appendix to this brief, *infra* at 1a-8a.

4. The First Use Tax on Natural Gas — Severance Tax Credit, La. Rev. Stat. Ann. § 47:647 (West Supp. 1979), is set out in full in the Appendix to this brief, *infra* at 9a-12a.

5. The First Use Tax Trust Fund, La. Rev. Stat. Ann. § 47:1351 (West Supp. 1979), is set out in full in the Appendix to this brief, *infra* at 13a-16a.

6. The Tax Credit for Electric and Natural Gas Service, La. Rev. Stat. Ann. § 47:11 (West. Supp. 1979), is set out in full in the Appendix to this brief, *infra* at 17a-20a.

STATEMENT

By this suit, Maryland, Illinois, Indiana, Massachusetts, Michigan, New York, Rhode Island and Wisconsin ("the plaintiff states") have invoked the original jurisdiction of this Court in order to challenge the constitutionality of the Louisiana First Use Tax on Natural Gas ("the First Use Tax").[1]

The First Use Tax, effective April 1, 1979, imposed a tax of seven cents per thousand cubic feet (Mcf) upon the first occurrence of any "use"[2] of natural gas within Louisiana. The alleged purpose of the tax is to prevent economic and physical waste of natural resources and to protect and provide compensation for adverse effects upon the state's shorelines, waterbottoms, and barrier islands. La. Rev. Stat. Ann. § 47:1303A (West Supp. 1979). Yet the tax explicitly provides that contractual provisions which would place responsibility for state taxes on the producers of natural gas are "against public policy and unenforceable to that extent." La. Rev. Stat. Ann. § 47:1303C (West Supp. 1979). Contemporaneously with the passage of the First Use Tax, the

[1] La. Rev. Stat. Ann. §§ 47:1301-1307 (West Supp. 1979). A copy of the First Use Tax is attached to the Complaint as Exhibit A and is also set out in full in the Appendix to this brief, *infra* at 1a-8a:

[2] Under the Act "use" includes, among other activities, the sale, transportation, or processing of natural gas, La. Rev. Stat. Ann. § 47:1302(8) (West Supp. 1979), but it does not include "natural gas used or consumed in the manufacture of fertilizer and anhydrous ammonia within the state." La. Rev. Stat. Ann. § 47:1303A (West Supp. 1979).

Louisiana legislature enacted a severance tax credit[3] which permits instate producers liable for the First Use Tax to credit that liability, dollar-for-dollar, against their severance tax liability.

Moreover, the First Use Tax is not imposed on such gas as is otherwise subject to a severance, production, or import tax levied by any state, territory, or the United States. Because Louisiana imposes a severance tax on all intrastate production,[4] the incidence of the First Use Tax is solely upon natural gas produced outside Louisiana, which, for practical purposes, means natural gas produced from federal enclaves, including the outer Continental Shelf ("OCS"). The OCS is a domain under the control of the federal government outside the seaward boundaries of the State of Louisiana.[5] Gas from these federally-controlled domains is transported through Louisiana by interstate pipelines.[6]

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[3] First Use Tax on Natural Gas — Severance Tax Credit, La. Rev. Stat. Ann. § 47:647 (West Supp. 1979). A copy of the First Use Tax on Natural Gas — Severance Tax Credit is attached to the Complaint as Exhibit B and is also set out in full in the Appendix to this brief, *infra* at 9a-12a.

[4] La. Rev. Stat. Ann. § 47:631-646 (West 1970 & Supp. 1979). The severance tax on intrastate production of natural gas is also set at seven cents per Mcf. La. Rev. Stat. Ann. § 47:633(9) (West Supp. 1979).

[5] The outer Continental Shelf is defined and delineated in the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§ 1331-1343 (1976), *as amended by* Act of Sept. 18, 1978, Pub. L. No. 95-372, 92 Stat. 632 (codified at 43 U.S.C.A. §§ 1331-1356 (West Supp. 1979)). The Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1976), passed several months earlier in 1953, draws the line of demarcation between state and federal domains. The importance and value of the vast natural resources of the outer Continental Shelf are attested to by sea boundary disputes between Louisiana and the United States. United States v. Louisiana, 363 U.S. 1 (1960).

[6] Each of these pipelines is a "natural gas company" as defined in section 2 of the Natural Gas Act of 1938, 15 U.S.C. § 717a(6) (1976), and is regulated by the Federal Energy Regulatory Commission. As part of the Natural Gas Act's

The Federal Energy Regulatory Commission ("the FERC"), through the adoption of an automatic tracking mechanism,[7] has provided a procedure for consumer reimbursement of First Use Tax payments by pipelines. Although these charges are being collected subject to refund pending final judicial determination of the constitutionality of the tax, the immediate burden and incidence of the tax is being passed on directly to ultimate consumers.

Based on the volumes of natural gas entering Louisiana from the OCS in 1977, it has been estimated by the FERC that the First Use Tax will be imposed on approximately 3,190 million Mcf[8] resulting in the

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comprehensive regulatory scheme, the purchase of natural gas from producers, its transportation in interstate commerce, and its sale to distribution companies must be made pursuant either to certificates of public convenience and necessity or rate schedules or tariffs issued or approved by the Federal Energy Regulatory Commission.

[7] State of Louisiana First Use Tax in Pipeline Rate Cases, Docket No. RM 78-23, Order No. 10, "Order Establishing Procedures Governing Pipeline Recovery of the State of Louisiana First Use Tax," issued August 28, 1978, 43 Fed. Reg. 45,553 (Oct. 3, 1978); Order No. 10-A, "Order on Rehearing, Modifying Prior Order, Amending Regulation and Requesting Comment," issued December 20, 1978, 43 Fed. Reg. 60,438 (Dec. 28, 1978), *appeal docketed,* Tennessee Gas Pipe Line Co. v. Fed. Energy Regulatory Comm'n, No. 78-38-13, et al. (5th Cir. Dec. 26, 1978); Order No. 10-B, "Order on Rehearing, Modifying Prior Order and Amending Regulations," issued March 2, 1979, 44 Fed. Reg. 13,460 (Mar. 12, 1979); and "Order Directing the Solicitor to Seek Either an Order of the Court Permitting the Commission to Modify Its Orders or a Remand of the Record" app. A, issued July 13, 1979, 44 Fed. Reg. 46,291 (Aug. 7, 1979).

[8] This estimate is based on total OCS production entering Louisiana in 1977 of 3,647,513,674 Mcf, less 220 million Mcf in shrinkage during processing, 100 million Mcf reserved for the producer's own use or direct industrial sales, and 140 million Mcf consumed in the production of fertilizer and anhydrous ammonia in Louisiana. *See* Complaint, paragraph 14, Fed. Energy Regulatory Comm'n v. McNamara, Civil Action No. 78-384 (M.D. La., filed Sept. 29, 1978). The First Use Tax will also be imposed upon all volumes of natural gas that may be imported from foreign countries without severance taxes and imported through Louisiana.

imposition of a charge on consumers exceeding 225 million dollars in the first year. "Order Directing the Solicitor to Seek Either an Order of the Court Permitting the Commission to Modify Its Orders or a Remand of the Record" app. A, issued July 13, 1979, 44 Fed. Reg. 46,291, 42,292 (Aug. 7, 1979).

On March 29, 1979, the plaintiff states filed a motion for leave to file a complaint, a complaint, and a brief in support asking that this Court invoke its original jurisdiction over this matter. Louisiana responded with a brief opposing the acceptance of jurisdiction. This Court granted the plaintiffs' motion for leave to file the complaint on June 18, 1979, giving the defendant State of Louisiana sixty days within which to answer the complaint.

Louisiana filed its answer on August 17, 1979, and at the same time moved for the appointment of a special master to determine what Louisiana alleges are "many issues of fact." The defendant has failed to file any memorandum in support of this motion and in its twenty-seven page answer to the complaint, Louisiana has devoted only a single page to this question. Answer ¶LXX. There it simply lists eight subjects of "factual controvers[y]" that it maintains require "extensive evidentiary hearings." *Id.* While one of these subjects, the second relating to alleged environmental damage, may raise a factual issue, it, as well as each and every other subject, is irrelevant to the issues presented by this motion or is merely an attempted contradiction of the legal conclusions asserted by the plaintiff states.

Not a single subject of the alleged "factual controvers[y]" meets the claim by the plaintiff states that the First Use Tax is in conflict with and repugnant to federal statutes and is accordingly void under the supremacy clause of the United States Constitution. Similarly, none is relevant to the purely legal contentions under the commerce clause that the plaintiff states press in their current motion. These supremacy clause and commerce clause claims, the plaintiff states urge, should be dispositive of this litigation. Finally, it

is to be noted that for the purposes of their motion the plaintiff states have not included any claim presented by their complaint that even remotely may require factual development.[9]

The plaintiff states submit that they clearly demonstrate in this brief why this case is an appropriate one for judgment on the pleadings. For these reasons, and because Lousiana's answer does not even remotely suggest anything that would make this case inappropriate for judgment on the pleadings on the issues herein briefed, the plaintiff states submit that the grant of judgment as prayed in their complaint is proper.

SUMMARY OF ARGUMENT

The plaintiff states have moved for judgment on the pleadings contending that as a matter of law the Louisiana First Use Tax is violative of the supremacy clause and the commerce clause of the United States Constitution.

Supremacy Clause — Interference With the Natural Gas Act

The Louisiana First Use Tax, by taxing the volume of interstate gas, protecting instate interests through exemption and tax credit, making the tax a "cost" of marketing gas, and abrogating certain tax shifting contracts, is a tax on natural gas or its severance and an indirect attempt to regulate the interstate transportation and sale of natural gas. *Northern Natural Gas Co. v. State Corporation Commission of Kansas,* 372 U.S. 84 (1963); *Portland Pipeline Corp. v. Environmental Improvement Commission,* 307 A.2d 1 (Me.), *appeal dismissed,* 414 U.S. 1035 (1973). The tax interferes with the Federal Energy Regulatory Commission's pervasive ratemaking jurisdiction and discretion with regard to cost determination by forcing interstate consumers to

[9] The plaintiff states continue to believe that these other claims are genuine and could be decided summarily. The purpose of this brief, however, is to present argument beyond that appearing in the brief in support of the motion for leave to file the complaint on the issues on which judgment on the pleadings appears most appropriate.

bear the burden of the tax in the form of higher prices. Louisiana's scheme conflicts with the purposes of the Natural Gas Act by subjecting interstate consumers to excessive charges and by preventing equality of treatment among producing and consuming states. *Atlantic Refining Co. v. Public Service Commission of New York,* 360 U.S. 378 (1959); *FPC v. East Ohio Gas Co.,* 338 U.S. 464 (1950); *FPC v. Hope Natural Gas Co.,* 320 U.S. 591 (1944). By abrogating contractual provisions requiring reimbursement of the tax by producers, the First Use Tax interferes with the Commission's exclusive jurisdiction under 15 U.S.C. § 717 (1976) to determine the terms and conditions under which gas may be sold or transported in interstate commerce.

Supremacy Clause — Preemption by Outer Continental Shelf Lands Act

The clear thrust of the First Use Tax is to impose a severance tax on natural gas produced outside of Louisiana and particularly on the outer Continental Shelf. The Outer Continental Shelf Lands Act provides that state taxation laws shall not apply to the outer Continental Shelf. 43 U.S.C.A. § 1333(2) (A) (West Supp. 1979). This express provision, as well as the purpose of the Outer Continental Shelf Lands Act in providing for orderly natural gas development, are contravened by the Louisiana taxing scheme.

Commerce Clause — First Use Tax is a Tax on Interstate Commerce

The flow of natural gas in pipelines to points outside a state constitutes interstate commerce. *FPC v. East Ohio Gas Co.,* 338 U.S. 464 (1950). A state may not directly tax the flow of natural gas in interstate commerce. *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954). The "uses" purportedly taxed under the Louisiana scheme are artificial and not separate local activities that may be taxed.

Commerce Clause — Facial Discrimination Against Interstate Commerce

The First Use Tax is discriminatorily imposed only on gas imported into Louisiana. It does not apply to gas produced in Louisiana or to gas transported into Louisiana from a state that imposes a severance tax. In practical effect, it is a tax on the transmission of outer Continental Shelf and other imported natural gas into and through Louisiana. Because of the heavy burden likely to be imposed on out-of-state taxpayers, the Louisiana severance tax is not equivalent to the First Use Tax. *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64 (1963). The First Use Tax in conjunction with the severance tax credit discriminatorily favors pipeline companies that produce natural resources subject to the Louisiana severance tax and burdens those that do not. Finally, the tax discriminates against interstate commerce by exempting certain users from the tax.

Commerce Clause — Lack of Fair Apportionment

The First Use Tax is measured by total volume of the gas and is not related to any identifiable activity within the State of Louisiana. It is a tax on the gas and in economic effect a severance tax on gas produced outside Louisiana. Identifiable activities related to interstate natural gas are already subject to a comprehensive program of taxation in Louisiana. Because the tax is unfairly apportioned, it permits a multiple burden on interstate commerce. *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157 (1954).

Entitlement to Judgment on the Pleadings

The questions raised in this motion are purely legal. Louisiana's answer denies only legal conclusions, not issues of fact that are material to the resolution of this motion. All of the facts material to the determination of this controversy in its present posture have been admitted by Louisiana in its answer, already found

authoritatively by this Court, or are subject to its judicial notice.

ARGUMENT

I.

THE LOUISIANA FIRST USE TAX VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

The Louisiana First Use Tax is aimed only at interstate consumers of natural gas. Through a combination of exemption and tax credit, it immunizes instate distributors and protects instate consumers. The tax, which is measured by volume, attaches to the interstate gas itself, not to any actual "use" in the State of Louisiana. By abrogating tax shifting contracts and declaring the tax to be a cost of marketing the gas, the Louisiana statute attempts to tie the hands of the FERC on cost determination and to force out-of-state consumers to pay the tax. The First Use Tax pretends to be a measure aimed at protecting the environment and ensuring instate tax equity. This pretense, however, is simply statutory window dressing. It cannot disguise the true purpose of the First Use Tax — clear on its face — which is to generate extraordinary sums at the expense of interstate consumers. Nor can it disguise the clear effect of the First Use Tax, which is to cause multiple violations of the supremacy clause by placing improper obstacles in the way of the following federal statutory schemes: the Natural Gas Act of 1938, 15 U.S.C. §§ 717-717w (1976), *as amended by* Act of Nov. 9, 1978, Pub. L. No. 95-617, 92 Stat. 3167 (codified at 43 U.S.C.A. §§ 717-717z (West 1974 & Supp. 1979)); the Natural Gas Policy Act of 1978, Pub. L. No. 95-62, 92 Stat. 3350 (codified at 15 U.S.C.A. §§ 3301-3432 (West Supp. 1979)); and the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§ 1331-1343 (1976), *as amended by* Act of Sept. 18, 1978, Pub. L. No. 95-372, 92 Stat. 632 (codified at 43 U.S.C.A. §§ 1331-1356 (West Supp. 1979)).

The First Use Tax is a carefully contrived effort by a single state to tax the interstate transportation and sale of natural gas, an area within the exclusive jurisdiction of the federal government. It is an attempt to exploit out-of-state consumers with excessively high prices, usurp the power of the FERC with regulation masked as taxation, and hinder the development of gas from the outer Continental Shelf by imposing a tax that federal law expressly prohibits. Accordingly, the First Use Tax patently violates the supremacy clause of the Constitution and must be enjoined.

In *McCulloch v. Maryland,* 17 U.S. (4 Wheat) 316 (1819), Chief Justice Marshall said of the supremacy clause, U.S. Const. art. VI, cl. 2,[10] that:

> It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence.

17 U.S. (4 Wheat) at 427.

More recently, in *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 157-58 (1978), this Court held that the supremacy clause invalidates or preempts state legislation when:

1. The scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it; *or*

2. The federal law touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject; *or*

3. The object sought to be obtained by the federal law and the obligations imposed by it reveal a purpose to dominate state law; *or*

[10] Art. VI, cl. 2, provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

4. The state law stands as an obstacle to the accomplishment and execution of full purposes and objectives of Congress.[11]

See also Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) ("[W]hen Congress has 'unmistakably . . . ordained' . . . that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.").

Application of these principles to a state statute presents only legal questions. *Douglas v. Seacoast Products*, 431 U.S. 265, 271-72 (1977); *Philadelphia v. New Jersey*, 430 U.S. 141 (1977). Thus this Court should not hesitate to invalidate the Louisiana First Use Tax.

A. *The Louisiana First Use Tax is an Impermissible Attempt to Regulate the Transportation and Sale of Natural Gas in Interstate Commerce and thus Violates the Natural Gas Act.*

On numerous occasions this Court has examined the scope and purposes of the Natural Gas Act of 1938. 15 U.S.C. §§ 717-717w (1976), *as amended by* Act of Nov. 9, 1978, Pub. L. No. 95-617, 92 Stat. 3167 (codified at 43 U.S.C.A. § 717-717z (West 1974 & Supp. 1979)). In the Natural Gas Act, Congress "meant to create a comprehensive and effective regulatory scheme." *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972); *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 520 (1947). The Act confers on the Federal Energy Regulatory Commission jurisdiction over the transportation and sale for

[11] In the first three situations, even harmonious state regulation must nevertheless be invalidated under the supremacy clause. DeCanas v. Bica, 424 U.S. 351, 356 (1976). In the latter case, a state statute is void to the extent it conflicts with federal law. Ray v. Atlantic Richfield Co., 435 U.S. at 158.

resale of natural gas in interstate commerce, 15 U.S.C. § 717 (1976), and preempts the exercise of such regulatory powers by the states. Although the Natural Gas Act envisions a dual state-federal regulatory authority in many matters, it leaves to the states no room for direct regulation, *Public Utilities Commission of Ohio v. United Fuel Gas Co.*, 317 U.S. 456 (1943), or indirect regulation, *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84 (1963), of the transportation and sale for resale of natural gas in interstate commerce.[12]

Under section 4(a) of the Natural Gas Act, 15 U.S.C. § 717c(a) (1976), all rates and charges made by a natural gas company subject to FERC jurisdiction must be "just and reasonable." In addition, companies must file with the FERC a schedule of their rates and charges for transportation and sale of natural gas subject to the Commission's jurisdiction as well as all contracts that may affect such rates and charges. 15 U.S.C. § 717c(c) (1976). Changes in rates, charges, services, and contracts must be filed in advance with the Commission, which can suspend them. 15 U.S.C. § 717c (1976). Section 5 of the Act, 15 U.S.C. § 717d (1976), gives the FERC certain powers to fix rates and charges and section 6, 15 U.S.C. § 717e (1976), authorizes the Commission for rate making and other purposes to ascertain the cost of the property of every natural gas company.[13] Section 7 of the Natural Gas Act of 1938, 15

[12] This Court has also observed that federal natural gas regulation "would be hamstrung if it were tied down to technical concepts of local law," United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392, 400 (1965), and that Natural Gas Act jurisdiction is not defeated because local interests may in some degree be affected. Interstate Natural Gas Co. v. FPC, 331 U.S. 682 (1947).

[13] Under 15 U.S.C. § 717d(a) (1976), the FERC may investigate and determine the cost of production or transportation of natural gas even in cases where the Commission lacks ratemaking jurisdiction. Section 110 of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (codified

U.S.C. § 717f (1976), *as amended by* Act of Nov. 9, 1978, Pub. L. No. 95-617, 92 Stat. 3173 (codified at 43 U.S.C.A. § 717f (West Supp. 1979)), requires natural gas companies to obtain from the Commission a certificate of public convenience and necessity before engaging in the transportation of natural gas.

A key purpose of these far-reaching provisions of the Natural Gas Act is "to protect ultimate consumers of natural gas from excessive charges." *FPC v. Interstate Gas Co.*, 336 U.S. 577, 581 (1949). *See also Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 388-89 (1959) ("The Act was so framed as to afford consumers a complete, permanent, and effective bond of protection from excessive rates and charges . . . . The overriding intent of the Congress [is] to give full protective converage to the consumer as to price . . . ."). In addition this Court has said that the FPC (now the FERC) "must be free to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 331 (1974).[14] Similarly, the Natural Gas Act recognizes "the importance of nationally controlling interstate pipelines in order to preserve 'equality of opportunity and treatment among the various communities and states concerned.'" *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 471 (1950). *See also Louisiana v. FPC*, 476 F.2d 140, 142 (5th Cir. 1973) ("A major purpose [of the Natural Gas Act] was to prevent the 'haves' from being unfair to the 'have nots.'"). Finally, this Court has taken particular note of the conflict between producing and consuming states over

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at 15 U.S.C.A. § 3320 (West Supp. 1979)), also authorizes the FERC to permit certain production-related costs to be reflected in the price of natural gas.

[14] This principle of equity and Commission flexibility "has obvious applicability in this time of acute energy shortage." 417 U.S. at 331.

state or federal regulatory authority as a factor justifying federal regulation:

> The unavoidable conflict between producing States and consuming States will create contradictory regulations that cannot possibly be equitably resolved by the courts. With these problems in mind, the desirability of uniform federal regulation is abundantly clear.

FPC v. Louisiana Power & Light Co., 406 U.S. 621, 633-35 (1972).

Thus, overcoming the balkanization of natural gas regulation and the discriminatory practices of gas-producing states is a dominant purpose of the Natural Gas Act. In light of the supremacy clause, the existence of such an intent on the part of a state statute is fatal, particularly where the state regulation is unmistakably aimed at interstate purchasers. *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84, 92 (1963).[15]

[15] In *Northern Natural Gas*, this Court, on supremacy clause grounds, invalidated a state regulation requiring gas companies to take ratably from all wells, and it noted:

> The danger of interference with the federal regulatory scheme arises because these orders are unmistakably and unambiguously directed at *purchasers* who take gas in Kansas for resale after transportation in interstate commerce. In effect, these orders shift to the shoulders of interstate purchasers the burden of performing the complex task of balancing the output of thousands of natural gas wells within the State, cf. Miller Bros. Co. v. Maryland, 347 U.S. 340 — a task which would otherwise presumably be the State Commission's. Moreover, any readjustment of purchasing patterns which such orders might require of purchasers who previously took unratably could seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States. This relationship is a matter with respect to which Congress has given the Federal Power Commission paramount and exclusive authority. See Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 610. The prospect of interference with the federal

The Louisiana First Use Tax is unmistakably aimed at interstate consumers of natural gas. The tax rate is applied not to any factor gauging intrastate activities, *e.g.*, gross receipts of certain uses, but to an obvious interstate factor — the volume of the gas. La. Rev. Stat. Ann. § 47:1303B (West Supp. 1979). The tax is imposed only if no state severance tax is due or has been paid on the gas. La. Rev. Stat. Ann. § 47:1303A (West Supp. 1979). Thus, gas produced in Louisiana and subject to that state's severance tax is not subject to the First Use Tax. A companion measure to the First Use Tax insures intrastate immunity by permitting taxpayers liable for that tax to credit that liability against their liability for the Louisiana severance tax. La. Rev. Stat. Ann. § 47:647A (West Supp. 1979). The tax is declared to be a "cost" associated with uses made by the owner in preparation of marketing of the natural gas, La. Rev. Stat. Ann. § 47:1303C (West Supp. 1979), and the statute renders unenforceable contracts requiring producers to pay the tax. La. Rev. Stat. Ann. § 47:1303C (West Supp. 1979). These provisions are clearly intended to cause the tax to be passed along to interstate consumers. Thus the tax is intended to add to the price of such gas while leaving unaffected intrastate gas.

This legislation strikes at the heart of the Natural Gas Act. First, no amount of statutory rhetoric, *see* La. Rev. Stat. Ann. § 47:1303E (West Supp. 1979), can

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regulatory power in this area is made even more acute by the fact that criminal sanctions imposed by state statute for noncompliance fall upon such purchasers and not upon the local producers. Therefore, although collision between the state and federal regulation may not be an inevitable consequence, there lurks such imminent possibility of collision in orders purposely directed at interstate wholesale purchasers that the orders must be declared a nullity in order to assure the effectuation of the comprehensive federal regulation ordained by Congress.

372 U.S. at 92.

disguise the fact that the First Use Tax is a tax on natural gas itself or its severance.[16] As far as interstate transportation of natural gas is concerned, few if any of the "uses" purportedly taxed by the statute, La. Rev. Stat. Ann. § 47:1302(8) (West Supp. 1979), involve any separate local activity. The form of the gas is not changed in any way because it passes through Louisiana. *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157, 169 (1954). In fact, the tax rate is actually applied not to any factor purporting to measure local use but to the volume of the gas. In *Portland Pipeline Corp. v. Environmental Improvement Commission,* 307 A.2d 1 (Me.), *appeal dismissed,* 414 U.S. 1035 (1973), this Court and the Supreme Judicial Court of Maine upheld the validity of a one-half cent per barrel license fee imposed by Maine upon the transportation of oil over its harbor waters. The argument was raised that the license fee burdened imports (i.e., the oil itself), but the Supreme Judicial Court of Maine found that the fee was imposed upon the offloading of oil.

> The license fee is completely unrelated to the value of the oil. It may be argued that the fee is imposed directly on the goods rather than on the activity of off loading because it is based upon volume. But although volume is not an unusual method of taxing goods, it is here an accurate gauge of the activity being taxed.
>
> It is also of importance that the volume of oil offloaded is directly related to the danger that the Act seeks to guard against.
>
> This present view of the tax as it will at first be applied is limited to short range application. *Over the long run the tax is not related to volume but strictly to the hazard of overwater oil transportation.*
>
> *When the Fund reaches the statutory limit, the imposition of the tax is ended.*

[16] In Colonial Pipeline Company v. Traigle, 421 U.S. 100, 113 (1975), this Court sagely observed that "an otherwise unconstitutional tax is not made the less so by masking it in words cloaking its actual thrust."

> Administrative and research costs and unreimbursed cleanup costs may cause collection of the tax to be resumed periodically. *The imposition of a charge upon the offloading of oil, over the long run, bears no relationship to either value or volume of imported oil* and are thus not fees imposed "on Imports or Exports."

307 A.2d at 33-34 (emphasis supplied).

In the present case, the Louisiana Tax contains none of the saving features that enabled the Maine license fee to withstand the challenge that it represented a tax on the goods themselves. Over the long run the First Use Tax is related *solely to volume*. It contains no statutory limit. Therefore, it is a tax on natural gas.

Second, the Louisiana statute interferes with the ratemaking jurisdiction of the FERC. This is an area where federal regulation is so pervasive and the federal interest so dominant that even *indirect* state action and the *possibility* of state interference is sufficient to invalidate the statute. *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84 (1963). *See also Oklahoma Corporation Commission v. FPC*, 415 U.S. 961 (1974) (*mem.*), *aff'g* 362 F. Supp. 522 (W.D. Okla. 1973). As this Court noted in *FPC v. United Gas Pipe Line Co.*, 386 U.S. 237, 243 (1967):

> One of [the Commission's] statutory duties is to determine just and reasonable rates which will be sufficient to permit the company to recover its costs of service and a reasonable return on its investment. Cost of service is therefore a major focus of inquiry. Normally included as a cost of service is a proper allowance for taxes, including federal income taxes. The determination of this allowance, as a general proposition, is obviously within the jurisdiction of the Commission.

The Louisiana First Use Tax could hardly be said to leave any room for the exercise of the Commission's statutory discretion with respect to permitting the tax to be reflected in natural gas rates. The statute

characterizes the First Use Tax as a cost and abrogates agreements which would place that burden on anyone other than the purchasers of the gas. Control by the FERC over cost-passthrough, like its authority over continuance of service (examined last term by this Court in *United Gas Pipe Line Co. v. McCombs*, ___ U.S. ___, 99 S. Ct. 2461 (1979)), "is a fundamental component of the regulatory scheme. To deprive the Commission of this authority, even in limited circumstances, would conflict with basic policies underlying the [Natural Gas] Act." *Id.* at 2467.[17]

Third, the Louisiana First Use Tax conflicts with the purposes of the Act by subjecting interstate consumers to excessive charges and by preventing equality of treatment among producing and consuming states. As this Court noted in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 612 (1944) (footnote omitted):

[17] The First Use Tax also conflicts with the FERC's cost-passthrough authority under section 110(a)(2) of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (codified at 15 U.S.C.A. § 3320(a)(2) (West Supp. 1979)). The tax, in addition, raises questions under section 110(b) of the 1978 Act (codified at 15 U.S.C.A. § 3320(b) (West Supp. 1979)). That section provides that:

> The State severance tax allowable . . . with respect to the production of any natural gas may not include any amount of State severance taxes borne by the seller which results from a provision of State law enacted on or after December 1, 1977, unless such provision of law is equally applicable to natural gas produced in such State and delivered in interstate commerce and to natural gas produced in such State and not so delivered.

Because of the broad definition of "state severance tax" contained in the Natural Gas Policy Act of 1978, because the purpose of the First Use Tax, La. Rev. Stat. Ann. § 47:1301A (West Supp. 1979), and its effect make it akin to a severance tax on out-of-state gas, and because the outer Continental Shelf off of Louisiana may be considered as a federal enclave in the state, *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 355 (1969), the First Use Tax may be considered a severance tax on natural gas "produced" in the state and not uniformly applied to interstate and intrastate sales as required by section 110(b).

> We cannot find in the words of the Act or in its history the slightest intimation or suggestion that the exploitation of consumers by private operators through the maintenance of high rates should be allowed to continue provided the producing states obtain indirect benefits from it.[18]

In *Corporation Commission of Oklahoma v. FPC,* 415 U.S. 961 (1974) (*mem.*), this Court affirmed a district court decision which invalidated state orders relating to wellhead price of natural gas. The lower court decision in large part relied upon the fact that the state orders challenged would have had an annual impact of more than $30 million upon the interstate consumer. *FPC v. Corporation Commission of Oklahoma,* 362 F. Supp. 522, 533 (N.D. Okla. 1973). Louisiana's First Use Tax will cost the consumers of the affected states ten times as much. Because the Louisiana statute is designed to enrich Louisiana's coffers solely at the expense of consuming states, it interferes with the purposes of the Natural Gas Act.

In summary, the Louisiana First Use Tax is an indirect attempt to regulate the transportation and sale of natural gas in interstate commerce. *Northern Natural Gas Co. v. State Corporation Commission of*

[18] In *Hope Natural Gas Co.,* West Virginia contended that the FPC in fixing a rate for natural gas produced in the state should have considered conservation of the state's gas deposits and the possible impairment of its tax structure rather than the benefit of out-of-state consumers. However, this Court replied that:

> . . . Congress was quite aware of the interests of the producing states in their natural gas supplies. But it left the protection of those interests to measures other than the maintenance of high rates to private companies. If the Commission is to be compelled to let the stockholders of natural gas companies have a feast so that the producing states may receive crumbs from that table, the present Act must be redesigned. Such a project raises questions of policy which go beyond our province.

320 U.S. at 613-14.

Kansas, 372 U.S. at 92.[19] Because of its design and effect it is markedly different than sustainable state taxes which may affect natural gas companies. In addition, because the First Use Tax takes aim at interstate consumers and at the FERC ratemaking and cost-passthrough process and because it compromises the laudable purposes of the Natural Gas Act, it should be gauged by those cases which invalidate *state regulation* inconsistent with the Natural Gas Act. *See Corporation Commission of Oklahoma v. FPC*, 415 U.S. 961 (1974); *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84 (1963). The First Use Tax intrudes upon pervasive federal natural gas regulation, frustrates the purposes of the Natural Gas Act, and harms an area where the federal interest is dominant.[20] For these reasons, is violates the supremacy clause of the United States Constitution and it invalid in its entirety.

The First Use Tax also violates the supremacy clause in that it declares contractual provisions requiring reimbursement by producers of costs incurred by pipelines (including taxes) "to be against public policy and unenforceable to that extent." La. Rev. Stat. Ann. § 47:1303C (West Supp. 1979). Section 7(c) of the Natural Gas Act of 1938, 15 U.S.C. § 717f(c) (1976), *as amended by* Act of Nov. 9, 1978, Pub. L. No. 95-617, 92 Stat. 3173

[19] Louisiana's attempt to cloak the First Use Tax "in the currently fashionable garb of environmental protection," Douglas v. Seacoast Products, Inc., 431 U.S. 265, 285 n.21 (1977), will not save the statute. In *Northern Natural Gas*, this Court held that state conservation measures aimed directly at interstate purchasers cannot be sustained when they threaten the comprehensive scheme of federal regulation contained in the Natural Gas Act. 372 U.S. at 94.

[20] *See* "Order Directing the Solicitor to Seek Either an Order of the Court Permitting the Commission to Modify Its Orders or a Remand of the Record" app. A, 44 Fed. Reg. 46, 291, 46, 292 (Aug. 7, 1979) ("The Commission is of the opinion that the First Use Tax is unconstitutional and directly interferes with paramount federal authority to determine rates and charges, and to issue certificates of public convenience and necessity, for the transportation or sale of natural gas in interstate commerce.").

(codified at 43 U.S.C.A. § 717f (West Supp. 1979)), provides that no person may sell or transport natural gas in interstate commerce for resale without first obtaining a certificate of public convenience from the Commission. These certificates are sought and obtained in full recognition of the terms and conditions of the underlying contract for the sale of natural gas. *See, e.g., Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 387 (1959). Indeed, as the Federal Energy Regulatory Commission has noted, numerous contracts contain provisions requiring the producer or gatherer selling natural gas to an interstate pipeline to reimburse the pipeline for all costs (including any taxes) incurred as a result of extracting natural gas, liquids, or other treatment of the gas. State of Louisiana First Use Tax in Pipeline Rate Cases, Docket No. RM 78-23, Order No. 10-B, 44 Fed. Reg. 13,460, 13,462 (Mar. 12, 1979).Thus, the contract nullification provision of the First Use Tax, La. Rev. Stat. Ann. § 47:1303C (West Supp. 1979), by purporting to abrogate such provisions, conflicts with the federal regulatory scheme and violates the supremacy clause.

Moreover, changes in existing contracts underlying certificated sales of natural gas may be effected only by an amendment of the certificate by the Commission. 15 U.S.C. § 717c(d) (1976). Such changes cannot be made unless there is thirty days' notice to the FERC and the public, absent an FERC order to the contrary. *Id.* Thus, Congress has vested the Commission with exclusive jurisdiction to determine the terms and conditions under which natural gas may be sold or transported in interstate commerce. 15 U.S.C. § 717 (1976). The contract nullification provision of the First Use Tax, insofar as it attempts to proscribe reimbursement provisions incorporated into certificates issued by the Commission, violates the supremacy clause and is null, void, and of no effect.[21]

[21] In light of the importance of the contract nullification provisions to the taxing scheme, *see* section 4 of the First Use Tax law, Act No. 294, § 4, 1978 La. Sess. Law Serv. 482 (West), *infra* at 8a, the entire scheme must fall.

B. *The Louisiana First Use Tax is Preempted by the Outer Continental Shelf Lands Act.*

In 1953, Congress enacted the Outer Continental Shelf Lands Act of 1953, ch. 345, 67 Stat. 462, to provide for the orderly development of offshore resources. *United States v. Maine*, 420 U.S. 515, 527 (1975). To this end section 3(a) of the Act, 43 U.S.C. § 1332(a) (1976), *as amended by* Act of Sept. 18, 1978, Pub. L. No. 95-372, 92 Stat. 634 (codified at 43 U.S.C.A. § 1332 (West Supp. 1979)), stated:

> It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter.

In essence, this property was to be considered as a federal enclave in an upland state. *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 355 (1969). The Act also authorized the granting of oil and gas leases to qualified bidders "to meet the urgent need for further exploration and development of the oil and gas deposits of the submerged lands of the outer Continental Shelf." 43 U.S.C. § 1337(a) (1976), *as amended by* Act of Sept. 18, 1978, Pub. L. No. 95-372, 92 Stat. 640 (codified at 43 U.S.C.A. § 1337(a) (West Supp. 1979)).[22]

This Court has noted on more than one occasion the enormous development of oil and gas in the outer Continental Shelf which was made possible by the Act. For example, in *United States v. Maine*, this Court said of the Outer Continental Shelf Lands Act:

> Since 1953, when this legislation was enacted, 33 lease sales have been held, in which 1,940 leases, embracing over eight million acres, have been issued. The Outer Continental Shelf, since 1953, has yielded over three billion barrels of oil, 19 trillion mcf of natural gas, 13 million long tons of

[22] The payment of royalties was also required as one of the costs of such development. *Id.*

> sulfur, and over four million long tons of salt. In 1973 alone, 1,081,000 barrels of oil and 8.9 billion cubic feet of natural gas were extracted daily from the Outer Continental Shelf. Exploitation of our resources offshore implicates a broad range of federal legislation, ranging from the Longshoremen's and Harbor Workers' Compensation Act, incorporated into the Outer Continental Shelf Lands Act, to the more recent Coastal Zone Management Act.

420 U.S. at 527-28 (footnotes omitted).

More importantly, in *Atlantic Refining Co. v. Public Service Commission of New York,* 360 U.S. 378 (1959), this Court displayed appropriate sensitivity to the need of consumers of Continental Shelf gas to be free from exploitative prices. In holding that the Federal Power Commission was justified in initially not permanently certificating a sale of natural gas from the Continental Shelf until the rate level was shown to be in the public interest, this Court said:

> This is especially true where, as here, the initial price will set a pattern in an area where enormous reserves of gas appear to be present. We note that in petitioners' proof a map of the Continental Shelf area off of the coast of Louisiana shows that the leases here involved cover but 17 out of a blocked-out area covering some 900 blocks of 5,000 acres each. The potential of this vast acreage, in light of discoveries already made as shown by the record, is stupendous. The Commission has found that the transaction here covers the largest reserve ever committed to interstate commerce in a single sale. Indications are that it is but a puff in comparison to the enormous potentials present under the sea bed of the Gulf. The price certificated will in effect become the floor for future contracts in the area. This has been proven by conditions in southern Louisiana where prices have now vaulted from 17 cents to over 23 cents per MCF. *New price plateaus will thus be created as new contracts are made and unless controlled will result in "exploitation" at the expense of the consumer, who eventually pays for the increases in his monthly bill.*

360 U.S. at 390 (emphasis added). Thus, it came as no surprise when, in 1975, this Court specifically enjoined Louisiana from interfering with the exclusive rights of the United States in the lands, minerals, and resources in the area of the Continental Shelf. *United States v. Louisiana,* 422 U.S. 13 (1975).

Without a doubt, Louisiana could not directly tax the natural gas produced on the outer Continental Shelf. The Outer Continental Shelf Lands Act expressly prohibits it. 43 U.S.C. § 1333(a)(2) (1976), *as amended by* Act of Sept. 18, 1978, Pub. L. No. 95-372, 92 Stat. 635 (codified at 43 U.S.C.A. 1333(2)(A) (West Supp. 1979)) ("State taxation laws shall not apply to the outer Continental Shelf.") This state tax prohibition, re-enacted in 1978 in the Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629, demonstrates congressional recognition that such taxation will impede the purpose of the Act in providing for the orderly development of shelf resources. Even in the absence of such a prohibition, this taxation would be prohibited. *See Mississippi River Fuel Corp. v. Cochreham,* 382 F.2d 929 (5th Cir. 1967), *cert. denied,* 390 U.S. 1014 (1968) (holding that the Louisiana severance tax could not constitutionally be imposed on the severance of oil and gas by a lessee under a mineral lease from the United States on federal land in Louisiana).

With the First Use Tax, however, Louisiana tries to accomplish indirectly what it cannot do directly. An avowed purpose of the Louisiana First Use Tax is to compensate the state for the alleged environmental damage caused by the severance of natural gas beyond the boundaries of Louisiana. La. Rev. Stat. Ann. § 47:1301B (West Supp. 1979). It is also justified as an attempt to remedy the alleged discriminatory effect of the state's own severance taxes on Louisiana natural gas producers. La. Rev. Stat. Ann. § 47:1301A (West Supp. 1979). The tax is imposed only if no state

severance tax is due or has been paid on the gas and is set at the same rate as the severance tax. La. Rev. Stat. Ann. § 47:1303 (West Supp. 1979). Taxpayers liable for First Use Tax may credit that liability against their liability for the Louisiana severance tax. La. Rev. Stat. Ann. § 47:647 (West Supp. 1979). The tax is imposed on the volume of the gas, La. Rev. Stat. Ann. § 47:13 (West 1970), and thus is aptly categorized as a tax on the gas itself. *See Portland Pipeline Corp. v. Environmental Improvement Commission,* 307 A.2d 1, 33-34 (Me.), *appeal dismissed,* 414 U.S. 1035 (1973). Although the First Use Tax proclaims that it should not be construed as imposing a tax on the production, severance, or ownership of natural gas produced outside the boundaries of Louisiana, La. Rev. Stat. Ann. § 47:1303E (West Supp. 1979), the clear thrust of the statute is to impose a severance tax on natural gas produced outside Louisiana. Moreover, the tax is aimed at the gas of the outer Continental Shelf. La. Rev. Stat. Ann. § 47:1301 (West Supp. 1979). Despite the defendant's protestations that the First Use Tax is not a tax on the gas or its severance, the statute by exemption, credit, and passthrough ensures that the burden of the tax will fall on Continental Shelf gas and ultimately on the out-of-state consumer. It was this kind of consumer exploitation that this Court condemned in *Atlantic Refining Co.*

The Louisiana First Use Tax contradicts the express language of the Act as well as its statutory purpose of providing for the orderly development of offshore resources and natural gas development on the outer Continental Shelf.[23] For these reasons, the tax violates the supremacy clause and is void in its entirety.[24]

[23] It cannot be disputed that orderly development of outer Continental Shelf resources would be severely disrupted if other coastal states implemented measures such as the First Use Tax to obtain windfall benefits from new gas and oil discoveries on the Shelf.

[24] Even Louisiana's purported rationales for the First Use Tax raise questions under the supremacy clause. The First

II.

THE LOUISIANA FIRST USE TAX VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

The commerce clause, U.S. Const. art. I, section 8, cl. 3, provides that Congress has the power:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

This grant of power to Congress constitutes a withdrawal of power from the states. *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318, 328 (1977). Specifically, the commerce clause mandates that a state tax on interstate commerce must be: (1) "fairly apportioned"; (2) "not discriminat[ory] against interstate commerce"; (3) "applied to activity with a substantial nexus with the State"; and (4) "fairly related to the services provided by the State." *Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734, 750 (1978). If a state tax fails *any one* of these four tests, it

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Use Tax states its concern with the physical and economic waste of Louisiana's gas. La. Rev. Stat. Ann. § 47:1301A (West Supp. 1979). This concern does not support a tax on interstate gas, however, because the economic waste of such gas is a matter of exclusive federal jurisdiction. FPC v. Transcontinental Gas Pipeline Corporation, 365 U.S. 1 (1961). To the extent that the Louisiana statute purports to be concerned with the physical waste associated with natural gas severance from the outer Continental Shelf, Congress has deemed this a federal concern, *see* 43 U.S.C. § 1334(a)(1) (1976), *as amended by* Act of Sept. 18, 1978, Pub. L. No. 95-372, 92 Stat. 636 (codified at 43 U.S.C.A. § 1334(a)(1) (West Supp. 1979)) (authorizing the federal government "to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, . . ."), and has enacted specific schemes for the management of and compensation for such waste. *See* Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1976), *as amended by* Act of July 26, 1976, Pub. L. No. 94-370, 90 Stat. 1013 (codified at 16 U.S.C.A. §§ 1451-1464 (West Supp. 1979)), and Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (codified at 43 U.S.C.A. §§ 1331-1356 (West Supp. 1979)).

must be held unconstitutional as a violation of the commerce clause. The plaintiff states submit that the Louisiana First Use Tax — which is designed to be, and unquestionably is, a tax upon interstate commerce — fails all four tests. Moreover, as a matter of law, on its face, the First Use Tax discriminates against interstate commerce and is not fairly apportioned. Because no factual development is necessary for the determination of either of these issues, this Court can and should proceed to grant the plaintiff states judgment on the pleadings on these grounds. *See Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977) (discrimination against interstate commerce); *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157 (1954), *approved in Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. at 749 n.18 (fair apportionment).

A. *The First Use Tax Is a Tax On Interstate Commerce.*

In measuring the validity of a state tax against the commerce clause, the threshold question to be answered is, "Does the tax reach interstate commerce?" The First Use Tax clearly does, for this Court has specifically held that the flow of natural gas in pipelines to points outside a state constitutes interstate commerce. *FPC v. East Ohio Gas Co.,* 338 U.S. 464, 467 (1950); *United Fuel Gas Co. v. Hallanan,* 257 U.S. 277 (1921). Indeed, the transmission of natural gas by high pressure pipelines is a national, not local, activity and constitutes interstate commerce whether within or without the state. *East Ohio Gas Co. v. Tax Commission of Ohio,* 283 U.S. 465, 470 (1931).

A state may not directly tax the flow of natural gas in interstate commerce. In *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954), the Court held that a state tax on gathering gas could not survive the commerce clause test:

> [A]s a basis for finding a separate local activity, the incidence must be a more substantial economic factor than the movement of the gas from a local outlet of one owner into the connecting interstate pipeline of another.

347 U.S. at 169.

The "uses" taxed by the First Use Tax are not "separate local activities" that may permissibly be taxed. The sale of the gas, or transfer of possession, control, or title, does not take the gas out of interstate commerce. *East Ohio Gas Co. v. Tax Commission of Ohio,* 283 U.S. 465 (1931). *Accord, Illinois Natural Gas Co. v. Central Illinois Public Service Co.,* 314 U.S. 498, 503-04 (1942). Nor may the tax be levied upon the transportation of the gas, or upon "other ascertainable action." Because the gas has not passed into the distribution system for delivery to consumers, it may not be taxed by the state.

The Court will note that in its answer (¶¶ XXXIV, XXXV, & LXX) the defendant State of Louisiana denies that the First Use Tax reaches interstate commerce. As demonstrated above, however, the defendant's assertions are simply unsupportable. Louisiana, by bold allegations, cannot make that which has already been decided as a matter of law by this Court into an issue of fact.

B. *The First Use Tax On Its Face Discriminates Against Interstate Commerce.*

Louisiana, in its answer (¶¶ XL & XLI), similarly maintains that the First Use Tax does not discriminate against interstate commerce. This is a legal conclusion (an incorrect one) rather than a matter of fact and thus presents no bar to a decision by this Court on the question at the present juncture. Indeed, only two years ago the Court, without any proof of facts, held a state tax to discriminate against interstate commerce in

violation of the commerce clause. *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318, 328 (1977).

The plaintiff states submit that the First Use Tax must similarly be held, as a matter of law, to discriminate against interstate commerce. The test of discrimination articulated by this Court is as follows:

> Equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state.

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 70 (1963). Applying this test, it seems clear that the First Use Tax unfairly discriminates against interstate commerce in three respects. First, the tax is discriminatorily imposed only on gas imported into Louisiana (whether from a sister state or from outside the United States). Such gas is moving in interstate or foreign commerce at the time it is transported into Louisiana and continues in interstate commerce, without interruption, until it is transported out of, or is sold at wholesale for ultimate consumption within, Louisiana.[25] An equivalent tax is not imposed on gas produced in Louisiana or on gas transported into Louisiana from a state that imposes a severance tax. Yet the post-production flow of such gas enjoys the same protections and privileges and subjects Louisiana's environment to the same purported damages as outer Continental Shelf and other imported gas. In practical effect, what purports to be a tax on the "use" of natural gas within Louisiana is in fact a tax on the transmission of outer

[25] Louisiana insulates from the burden of the First Use Tax certain sales at wholesale for ultimate consumption in Louisiana. This is accomplished by the Tax Credit for Electric and Natural Gas Service, La. Rev. Stat. Ann. § 47:11 (West Supp. 1979). This legislation further evidences Louisiana's systematic efforts to assure that the First Use Tax burdens only out-of-state consumers.

Continental Shelf and other imported natural gas into and through Louisiana in interstate commerce.

Louisiana maintains in its answer (¶ XL) that the First Use Tax does not discriminate against interstate commerce "because an equivalent tax is in fact imposed as a severance tax upon all gas produced within" Louisiana and sold elsewhere. While it is true that natural gas produced in Louisiana is subject to a severance tax at a comparable rate, the First Use Tax is clearly not an "equivalent tax" because the severance tax is by definition intended to compensate the state for the depletion of its natural resources, a depletion to which outer Continental Shelf and imported natural gas simply do not contribute.

This Court has specifically recognized that even when out-of-state taxpayers are taxed at the same rate but by a different tax than is imposed on instate taxpayers, the out-of-state taxpayer is likely to incur a heavier burden. *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. at 76. In *Halliburton* the Court struck down another Louisiana use tax on commerce clause grounds. In his concurring opinion, Mr. Justice Brennan noted that even though the out-of-state taxpayer was taxed at the same rate as the instate taxpayer, "the in-state seller is somewhat likelier to absorb some part of the sales tax burden than is the out-of-state seller to absorb the burden of the use tax which his customer eventually must pay." *Id.* Nor can the defendant successfully maintain that the First Use Tax is equivalent to the severance tax because Louisiana exempts from the First Use Tax natural gas subject to another state's severance tax: this gas will not be subject to any Louisiana Tax.

In addition, the burden of the First Use Tax and the severance tax do not fall on similarly situated taxpayers as required by *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. at 70. Louisiana law allows contract

provisions that shift the severance tax burden to the producer. La. Rev. Stat. Ann. § 47:633.1 (West 1970). Thus the buyer of Louisiana-produced gas may contractually impose the severance tax burden upon the producer, whereas the buyer of outer Continental Shelf gas is affirmatively prevented from obtaining reimbursement from the producer. This taxing scheme clearly treats similarly situated taxpayers differently and discriminates against interstate commerce.

Another way in which the First Use Tax discriminates against interstate commerce is that the severance tax credit portion of the statute, La. Rev. Stat. Ann. § 47:647 (West Supp. 1979), permits taxpayers liable for the First Use Tax to credit that liability, dollar-for-dollar, against their liability for Louisiana's severance tax, which is set at the same rate of seven cents per Mcf, up to the amount of that liability. The First Use Tax, applied in conjunction with the severance tax credit, discriminates against (and is designed to discriminate against) interstate commerce because it favors pipeline companies that produce natural resources subject to the Louisiana severance tax and burdens those that do not.

Finally, the First Use Tax discriminates against interstate commerce because it exempts from liability for the tax volumes of natural gas, otherwise subject to the tax, consumed in specified uses in Louisiana. Volumes of natural gas subject to the tax consumed in similar uses in other states are not given an equivalent exemption. Thus, Louisiana has favored certain instate uses, such as the production within Louisiana of sulphur, fertilizer, and anhydrous ammonia, to the disadvantage of similar out-of-state uses. La. Rev. Stat. Ann. § 47:1303A (West Supp. 1979). *See also* La. Rev. Stat. Ann. § 47:11 (West Supp. 1979) (insulating certain instate utilities from the burden of the First Use Tax by providing tax credits).

C. *The Louisiana First Use Tax Is Not Fairly Apportioned.*

Not only does the First Use Tax discriminate against interstate commerce, it also is unfairly apportioned. Predictably, Louisiana denies this in its answer (¶ XXXVII). The plaintiff states, however, submit that this denial, like the defendant's allegation that the First Use Tax does not discriminate against interstate commerce, is a legal conclusion, and an incorrect one at that. Thus, this denial puts no material fact in dispute and hence in no way hinders this Court from concluding that as a matter of law the First Use Tax is not fairly apportioned.

The First Use Tax is not fairly apportioned because it is not related to the taxpayer's investment in facilities, actual business activities, gross receipts, payroll, or any other identifiable activity within the State of Louisiana. The tax is a tax on outer Continental Shelf gas, not on local activities. Notwithstanding the assertion by Louisiana to the contrary, La. Rev. Stat. Ann. § 47:1303E (West Supp. 1979), the tax is, in economic effect, a severance tax on gas produced *outside of* Louisiana. *Cf. Portland Pipeline Corp. v. Environmental Improvement Commission,* 307 A.2d 1, 33-34 (Me.), *appeal dismissed,* 414 U.S. 1035 (1973). Indeed the gas itself may be seized if the tax is unpaid. La. Rev. Stat. Ann. § 47:1306B (West Supp. 1979).

This Court in recent years has approved a tax as apportioned properly only when that tax was levied solely on the *value* of an *identifiable activity* which occurred *within* the state. *Department of Revenue of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Here, the activity which occurs within the State of Louisiana is the transportation and processing of natural gas dedicated to interstate use. Therefore, while it can be said that an

identifiable portion of that activity occurs within Louisiana, the measure of the gas is totally unrelated to that identifiable portion. Instead, in the case at hand, the tax is measured by the *total volume* of natural gas shipped through Louisiana. Thus the First Use Tax is not in any way apportioned to the activities occurring in Louisiana.

Those identifiable activities related to interstate natural gas are subject to a comprehensive program of taxation in Louisiana. For instance, the pipelines involved in the transportation of the gas against which Louisiana assesses the First Use Tax already pay an Ad Valorem Property Tax assessed against the gross value of all property owned by the pipelines in the state, La. Rev. Stat. Ann. § 47:1951 (West 1950); a Royalty Gas Excise Tax assessed against the market value of gas, La. Rev. Stat. Ann. § 47:691 (West 1970); a Natural Gas Franchise Tax assessed against 1% of the gross receipts in the State of Louisiana, La. Rev. Stat. Ann. § 47:1031 (West 1970); an Income Tax based upon gross income from Louisiana state activities, La. Rev. Stat. Ann. §§ 47:21-298 (West 1970 & Supp. 1979); and an Occupational License Tax based upon the gross receipts in state, La. Rev. Stat. Ann. § 47:358 (West 1970).[26] The plaintiff states do not suggest that any of these Louisiana taxes on specific measurable values of natural gas are unfairly apportioned. They do submit, however, that the First Use Tax, which attempts to tax the total volume of natural gas rather than an identifiable portion of its value, is clearly unfairly apportioned.

Moreover, this failure to apportion exposes interstate gas to the unconstitutional "burden of multiple taxa-

[26] In addition, Louisiana has enacted its own Coastal Zone Management Act, La. Rev. Stat. Ann. §§ 49:213.1-.21 (West Supp. 1979), which requires the pipeline companies to obtain coastal use permits.

tion." *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 458 (1959). If Louisiana is permitted to impose this unapportioned tax, every other state will be invited to tax the volume of gas passing through its territory. Thus, the Louisiana First Use Tax, if permitted to stand, would set a precedent that would constitute an enormous burden on interstate commerce.

In a case involving a taxing scheme markedly similar to the one at issue here, this Court held the tax unconstitutional precisely because it would "permit a multiple burden" on interstate commerce. *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157, 170 (1954). In that case, Texas levied a tax on the entire volume of natural gas "gathered" within the state. "Gathering" was, the Court noted, artificially defined as the first taking or first retaining of possession of such gas.[27] *Id.* at 164. The Court held the statute unconstitutional, reasoning that "if Texas may impose this 'first taking' tax measured by the total volume of gas so taken, then Michigan and the other recipient states have at least equal rights to tax the first taking or 'unloading' from the pipeline of the same gas when it arrives for distribution." *Id* at 170. Furthermore, "Oklahoma might then seek to tax the first taking of the gas as it crossed into that state" and the "net effect would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate." *Id.* No facts were presented by the taxpayer to support this multiple burden argument. Rather, the Court was satisfied that the activity taxed was so closely related to interstate commerce that the risk of multiple taxation was not constitutionally permissible.

[27] As the Court also noted, the interstate pipeline companies in *Michigan-Wisconsin,* like the interstate pipeline companies here, "exclusive of the tax in question," paid "an ad valorem tax on all facilities and leases within the state." *Id.* at 163.

In the case at hand, the activity taxed, *i.e.*, the "use," is similarly so closely related to interstate commerce that the risk of multiple taxation is simply not constitutionally permissible. The definition of "use" in the First Use Tax like the definition of "gathering gas" in the *Michigan-Wisconsin* case, is a "beggared definition," *id.* at 164, because the word "use" in effect encompasses any possible activity affecting the natural gas. In its normal economic sense, use refers to an ultimate consumption of a good, either immediately or over a period of time. Thus, a tax imposed on use in that sense is not capable of duplication, since the same object can only be used once. However, given the statutory definition of use in the First Use Tax, the tax could be duplicated by every other state between Louisiana and the state in which the natural gas is ultimately distributed and the same volume of natural gas could be taxed many times over.

For this reason, when the analysis of *Michigan-Wisconsin* is applied to the case at hand, the plaintiff states submit that the First Use Tax must similarly be held unconstitutional because it would permit the "burden of multiple taxation" to fall on interstate commerce. Moreover, it is crystal clear that this analysis in *Michigan-Wisconsin* is still controlling and thus applicable here, for this Court specifically approved it just last term:

> This court [in *Michigan-Wisconsin*] declared the tax unconstitutional because it amounted to an unapportioned levy on the transportation of the entire volume of gas. The exaction did not relate to the length of the Texas portion of the pipeline or to the percentage of the taxpayer's business taking place in Texas. Today's decision does not question the *Michigan-Wisconsin* judgment, because Washington apportions its business and occupation tax to activity within the State. *Taxes that are not so apportioned remain vulnerable to Commerce Clause attack.*

Department of Revenue of Washington v. Association of Washington Stevedoring Companies, 435 U.S. 734, 749 n.18 (1978) (emphasis added).

The First Use Tax is, as demonstrated above, "not so apportioned." Accordingly, it must be held to violate the commerce clause.

III.

THE PLAINTIFF STATES ARE ENTITLED TO JUDGMENT ON THE PLEADINGS.

As demonstrated in the first and second arguments above, the supremacy clause and commerce clause claims pressed in this motion raise purely legal questions. Thus, judgment on the pleadings is appropriate.

It is true that the answer of the defendant State of Louisiana contains pro forma denials or contradictions of material allegations of the complaint and that it asserts that "many factual controversies have been raised by the pleadings." Answer ¶ LXX. None of these mock denials, contradictions, or assertions, however, prevents the entry of judgment on the pleadings because it is obvious that all of the facts material to the determination of this controversy in its present posture have been admitted by Louisiana in its answer, already found authoritatively by this Court, or are otherwise subject to its judicial notice. *United States v. Louisiana,* 363 U.S. 1 (1960); *Fletcher v. Evening Star Newspaper Co.,* 133 F.2d 395 (D.C. Cir. 1942) (court can take judicial notice of its own records or of other cases dealing with the same subject matter or questions of a related nature); 6 J. Moore, W. Taggart, & J. Wicker, Moore's Federal Practice ¶ 56.11[9], at 56-297 (1976) ("The proposition that a court may take judicial notice of its records and files has frequently proved useful in summary judgment proceedings."). *Cf. United States v. John J. Felin & Co.,* 334 U.S. 624, 639 (1948) ("It is as old as the common law that an allegation purporting to

be one of fact but contradicted by common knowledge is not confessed by a demurrer."). Thus, although judgment on the pleadings is not appropriate if a material issue of fact exists, federal courts "have been firm in requiring that the issues be genuine and not based on mere pro forma denials or sham or patently false assertions in the pleadings." 5 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1368, at 696 (1969). *See Hargis Canneries, Inc. v. United States,* 60 F. Supp. 729 (W.D. Ark. 1945) ("The motion for judgment on the pleadings admits all facts well pleaded, but does not admit conclusions of law; facts which the court will take judicial notice are not true; legally impossible facts; facts which would be inadmissible in evidence in the event of a trial nor facts which might appear by a record or document included in the pleadings to be unfounded.").

Louisiana argues that it should be allowed to present evidence of the factual basis of its defense in order to prove:

> (1) The close connection between the activities being taxed and the State of Louisiana;
>
> (2) The nature and extent of environmental damage sustained by Louisiana as a consequence of the taxed activity associated with the preparation for marketing of the affected gas;
>
> (3) The additional and substantial costs and burdens imposed upon state and local government as a consequence of the activities necessary to develop and market the gas affected by the tax;
>
> (4) The non-discriminating character of the tax in question;
>
> (5) A rational and reasonable basis and public policy in support of the First Use Tax, its stimulation of energy production, and its fair contribution to the support of the costs, burdens, risks, and hazards necessarily resulting to Louisiana or any other state of first entry of OCS gas;

(6) The nature of and necessity for the taxed activities prior to marketing of the gas for ultimate consumption;

(7) That the gas affected by the tax is not in interstate commerce at the time of occurrence of any local use taxed; and

(8) That the tax in question has no effect on gas characterized as an import from a foreign country.

Answer ¶ LXX.

The plaintiff states believe, however, that the Court should not receive evidence on these subjects because they are either legal conclusions or irrelevant to the grounds pressed by the plaintiff states in their current motion. For example, the subjects of paragraphs (1), (2), (3), (5), (6), and (8) are irrelevant to any of the commerce clause issues that are pressed in this motion and are wholly irrelevant to the supremacy clause questions. The subjects of paragraphs (4) and (7) in the defendant's parade of purported factual questions are similarly irrelevant. They address mere legal conclusions. Discrimination against interstate commerce, the subject of paragraph (4), is determinable in the absence of a factual record. *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977). Similarly, whether the gas in question is in interstate commerce, the subject of paragraph (7), is a legal question that this Court has already authoritatively determined in the affirmative. *FPC v. East Ohio Gas Co.,* 338 U.S. 464, 467 (1950). Thus, the plaintiff states urge that the Court need not receive evidence on these issues in determining their motion for judgment on the pleadings.

CONCLUSION

Whether the First Use Tax is characterized as a tax on natural gas, its out-of-state severance, or its interstate transmission, the tax violates the Constitution. For all of the reasons stated above, this Court should now enter a decree granting judgment as prayed in the complaint of the plaintiff states, specifically, declaring and adjudging, pursuant to 28 U.S.C. § 2201 (1976), that the Louisiana First Use Tax is unconstitutional and unenforceable with respect to natural gas transported or sold in interstate or foreign commerce; issuing a permanent injunction prohibiting defendant and its agents and employees from collecting the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce; ordering that any and all revenues collected pursuant to the First Use Tax with respect to natural gas transported or sold in interstate commerce be refunded to the taxpayers together with interest thereon; and granting the plaintiff states their costs herein expended and such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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APPENDIX

First Use Tax Natural Gas

ACT NO. 294

HOUSE BILL NO. 768

An Act to amend Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950 by adding thereto a new Chapter to be designated as Chapter 16 thereof to contain a Part I comprising Sections 1301 through 1307, providing for the levy and collection of a tax on the first use, in the state of Louisiana, of natural gas produced outside of the territorial limits of the state of Louisiana, which is not subject to the levy of an import tax or customs duty by the United States as an import from a foreign country, and upon which no severance tax or tax upon the volume of production has been paid to any state or territory of the United States; providing a definition of first use and for other definitions; providing for exclusions from the tax; providing for the imposition and rate of the tax; declaring certain contractual agreements unenforceable; providing for the point at which the gas is measured and the tax assessed; providing for the reporting and collection thereof and promulgation of regulations; providing for commingling; providing penalties; providing for the disposition of the collections of the tax; and providing otherwise both generally and specifically with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. Chapter 16 of Subtitle II of Title 17 of the Louisiana Revised Statutes of 1950 containing a Part I and comprising Sections 1301 through 1307 of Title 47 is hereby enacted to read as follows:

CHAPTER 16. FIRST USE TAX

Part I. First Use Tax On Natural Gas

§ 1301. State policy

A. The conservation of natural resources is of vital concern to the present and future welfare of our state

and nation, and it is the policy of the state of Louisiana, in the exercise of its police and taxing power, to prevent the physical and economic waste of its natural resources. It is recognized that other existing laws providing limitations upon the production of oil and gas are allowed within the state, and the imposition of a tax upon the severance of these natural resources from the soil and water of the state fail to prevent the economic waste of these Louisiana natural resources and will unfairly tax Louisiana producers in a discriminatory fashion, unless the state equally and uniformly taxes the introduction for the first time into the economy of the state natural gas which has not been otherwise or elsewhere subject to taxation by or within the United States.

B. The waterbottoms, barrier islands and coastal areas within this state are also valuable natural resources, as they provide essential habitat for many forms of wildlife and aquatic life in Louisiana, help protect our coastline from erosion, and are of aesthetic, commercial and recreational value to the citizens of our state and nation. It is further recognized that while other existing laws, applicable to the production of oil and natural gas, provide recompense in the form of taxes to the people of the state of Louisiana for adverse effects on the natural resources, barrier islands, waterbottoms, and shorelands of this state, these laws fail to provide protection for such valuable natural resources or compensation to the people of Louisiana for the necessary adverse effects caused by entry for use for the first time in Louisiana, under the protection of the state's laws, of natural gas which has not been subject to taxation otherwise or elsewhere by or within the United States unless the state levies an equitable tax thereon.

C. It is one of the express purposes of this tax to require the exaction of fair and reasonable compensation to the citizens of this state for the costs incurred and paid with public funds, which costs enure solely to the benefit of the owners of natural gas produced

beyond the boundaries of Louisiana, although introduced into the state, and to provide some measure of reimbursement to the citizens for damages to the state's waterbottoms, barrier reefs, and sensitive shorelands as a direct consequence of activity within the state associated with such natural gas by the owners thereof.

§ 1302. Definitions

The definitions hereinafter set forth shall have the meanings ascribed to them unless the context of use clearly indicates otherwise:

(1) "Oil, condensate, distillate or similar hydrocarbons" are liquid hydrocarbons remaining in a liquid state at 15.025 pounds per square inch absolute and sixty degrees Fahrenheit.

(2) "Natural gas" is natural or casinghead gaseous phase hydrocarbons remaining after separation from either oil, condensate, or distillate and measured at a pressure base of 15.025 pounds per square inch absolute at a temperature base of sixty degrees Fahrenheit.

(3) "Processing" is the scrubbing of a natural gas stream by specifically applied mechanical processes of absorption, adsorption, compression, cooling, cryogenics, refrigeration or any combination thereof for the purpose of extracting natural or casinghead gasoline, methane, ethane, propane, butane and other liquefiable hydrocarbons.

(4) "Refining" is the process by which crude oil, distillate and condensate are separated or fractionated into the various component parts or purified.

(5) "Storage" means and includes any keeping or retention in this state of oil and natural gas.

(6) "Measurement" is any process by which the volume of natural gas affected by this Part is determined.

(7) "Sale" is the transfer of ownership of and title to natural gas from one person to another for valuable consideration.

(8) "Use" is: the sale; the transportation in the state to the point of delivery at the inlet of any processing plant; the transportation in the state of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; transfer of possession or relinquishment of control at a delivery point in the state; processing for the extraction of liquefiable component products or waste materials; use in manufacturing; treatment; or other ascertainable action at a point within the state.

(9) "Owner" is the person or person having title to and the right to alienate the natural gas subject to the tax at the time a use occurs in the state. It shall not include any person to whom temporary possession or control has been transferred. In the event of a sale the purchaser shall be deemed the owner.

§ 1303. Imposition; exclusions; commingling

A. Pursuant to the exercise of the police and taxing powers of the state for the purpose of preventing economic and physical waste of our natural resources and for protecting and providing compensation for adverse effects upon the state's shorelands, waterbottoms and barrier islands, there is hereby levied and imposed a tax upon the first occurrence within this state of any use, as defined in this Part, of any natural gas upon which no severance tax or tax upon the volume of production has been paid, or is legally due to be paid, to this state or any other state or territory of the United States, or which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country. The tax levied herein shall not apply to natural gas otherwise subject thereto when such gas is used or consumed in the drilling for or production of oil, natural gas, sulphur, or in the processing of natural gas for liquids extraction within the state; nor shall it apply to gas shrinkage volumes attributable to the extraction of ethane, propane, butanes, natural or casinghead gasoline or other liquefied hydrocarbons, provided shrinkage volumes shall not exceed equivalent gas volumes of the extract-

ed liquids computed by recognized conversion factors used by the Gas Processors Association nor shall it apply to natural gas used or consumed in the manufacture of fertilizer and anhydrous ammonia within the state.

B. The tax imposed by Subsection A of this Section shall be computed at a rate of seven cents on each unit of natural gas as to which a use first occurs within the state. For the purposes of this tax a unit shall be one thousand cubic feet of natural gas as measured at a pressure base of 15.025 pounds per square inch absolute and at a temperature base of sixty degrees Fahrenheit.

C. In furtherance of the public policy and purpose set forth in Section 1301 of this part, and particularly Subsection C of said Section, this tax shall be deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas. Any agreement or contract by which an owner of natural gas at the time a taxable use first occurs claims a right to reimbursement or refund of such taxes from any other party in interest, other than a purchaser of such natural gas, is hereby declared to be against public policy and unenforceable to that extent. Notwithstanding any such agreement or contract, such an owner shall not have an enforceable right to any reimbursement or refund on the basis that this tax constitutes a cost incurred by such owner by virtue of the separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, or that this tax constitutes any other grounds for reimbursement or refund under such agreement or contract, unless there has been a final and unappealable judicial determination that such owner is entitled to such reimbursement or refund, notwithstanding the public policy and purpose of this part and the foregoing provisions of this Subsection C. In any legal action pursuant to this Subsection, the state shall be an indispensable party in interest.

D. When natural gas subject to the tax levied in this Part is commingled with oil and/or natural gas not

subject to the tax levied herein, it shall be presumed that the volumes withdrawn from the commingled mass by the first use shall be in the same ratio as the ratio of the resources entering the commingled mass.

E. Nothing in this Part shall be construed as imposing any tax on the production, severance, or ownership of natural gas produced outside of the boundaries of the state of Louisiana, it being the intention of this Part that the incidence of this tax shall not be upon the natural gas nor upon the property or rights from which it is produced, but rather shall be only upon the privilege of performance or allowing the performance, by the owner, of the enumerated actions comprising first use within the state.

F. If any use as defined in this Part and first occurring is determined not to be a constitutionally taxable incident, the tax shall be imposed upon the use first occurring thereafter.

§ 1304. Authority of the collector of revenue to promulgate rules and regulations

The collector of revenue is authorized to promulgate rules and regulations necessary to effect the intent and purpose of this Part, including regulations concerning the measurement of products associated with the incidents taxed herein.

§ 1305. Reports and payments; reimbursement limitations

A. The owner or owners of the natural gas at the time a use first occurs in this state shall file with the Department of Revenue and Taxation on or before the last day of each month following the month of first use, statements on forms procured from the department, showing the volumes, values, owners and such other information as the department may require by law or regulation for computing and assessing the amount of tax due under this Part.

B. The taxes levied by this Part shall be due and payable to the Department of Revenue and Taxation

monthly on or before the last day of the month following the month to which the tax is applicable by the owner or owners of the natural gas stream at the time any use, as defined herein, first occurs within the state.

§ 1306. Delinquent tax; failure to report or pay

A. The tax provided by this Part shall become delinquent after the date fixed for each monthly report to be filed in the office of the collector, and from such time shall be subject to the addition of interest, penalties, and costs as provided in Chapter 18, Subtitle II of this Title.

B. The failure to report or pay, within ninety days, in the manner and at the time required herein, the tax imposed by this Part on the first use of natural gas is unlawful, and the natural gas shall be deemed illegal gas subject to the provisions of R.S. 30:19 and, as such, shall be treated as contraband and shall be seized and sold as provided by R.S. 30:20.

§ 1307. Disposition of collections

The secretary shall remit all collections of taxes provided by this Part each month to the state treasurer, not later than the tenth day of the month following the month in which collections are made. The state treasurer shall credit all such collections to the state treasury.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

This Act shall become effective immediately upon signature by the governor and the adoption by the legislature of House Bill 140 of the 1978 Regular Session; provided however that taxes shall not begin to accrue on natural gas subject to the tax levied by this Part until 7:00 A.M. on April 1, 1979.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

Section 4. Notwithstanding the provisions of Section 2 of this Act, in the event that a final and unappealable judicial decision is rendered upholding the right of an owner to enforce a contract or agreement otherwise rendered unenforceable by R.S. 47:1303(C) of this Act, the following consequences shall ensue:

(1) If the right upheld arises from the provisions of a contract or agreement requiring any other party to reimburse or refund to an owner taxes incurred by such owner by virtue of the separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, then the tax levied in this Act shall not be due in respect to natural gas previously and thereafter sold pursuant to any contract or agreement containing such requirement, and the secretary of the Department of Revenue and Taxation shall forthwith return to each taxpayer all taxes previously paid in respect to such natural gas, together with interest at the rate of six percent per annum from the date the taxes were paid; or

(2) If the right upheld arises from the provisions of a contract or agreement requiring any other party to reimburse or refund to an owner costs or expenses incurred by such owner by virtue of separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, then this Act shall be null and void and the secretary shall forthwith return to each taxpayer all taxes previously paid, together with interest at the rate of six percent per annum from the date of payment.

All taxpayers receiving refunds and interest pursuant to this Section shall in turn remit such refunds and interest to all other parties from whom they have received payments pursuant to the aforesaid provisions of such contracts.

Approved July 6, 1978.

FIRST USE TAX ON NATURAL GAS —
SEVERANCE TAX CREDIT

ACT NO. 436

HOUSE BILL NO. 1187

An Act to amend Chapter 6 of Title 47 of the Louisiana Revised Statutes of 1950 by adding thereto a new Part I-B, to be comprised of R.S. 47:647; to provide a severance tax credit to persons liable for the payment of the first use tax levied in R.S. 47:1301 through R.S. 47:1307; to provide for the amount of the tax credit; to provide for parish allocations; to provide for regulations; and otherwise to provide with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. Part I-B of Chapter 6 of Title 47 of the Louisiana Revised Statutes of 1950, consisting of R.S. 47:647 is hereby enacted to read as follows:

PART I-B. SEVERANCE TAX CREDIT

§ 647. Severance tax credit.

A. Every taxpayer liable for and remitting taxes levied and collected pursuant to R.S. 47:1301 through 1307 and each taxpayer who bears such taxes as a direct result of contractual terms or agreements applied in disregard of R.S. 47:1303C, shall be allowed a direct tax credit, at any time following payment of such tax, but, not in excess of the amount which must be borne by such taxpayer, against severance taxes owed by such taxpayer to the state, the amount of which credit shall not exceed the amount of severance taxes for which such taxpayer is liable to the state as a direct consequence of the privilege of severing natural resources from the surface of the soil or water of the state. A taxpayer who bears any portion of the tax levied pursuant to R.S. 47:1301 through 1307 as a direct result of contractual terms or agreements applied in disregard of R.S. 47:1303C, shall be entitled to a credit under this Section only after there has been a

determination by the Louisiana Supreme Court or the appropriate United States District Court that such taxpayer must bear the tax, provided that if the taxpayer or the state has sought and been denied a preliminary injunction enjoining the application of such contractual terms or agreements sought to be rendered inapplicable by R.S. 47:1303(C), then such taxpayer shall be entitled to a credit under this Section from the date of denial of the preliminary injunction.

B. No tax credit pursuant to this Section shall be allowed for any taxes remitted pursuant to R.S. 47:1301 through 1307 for which a taxpayer has an enforceable right to reimbursement from a third party. A taxpayer claiming any credit under this Section shall furnish to the secretary of the Department of Revenue and Taxation all applicable contracts and other information requested by the secretary, which relate to such taxpayer's possible right to reimbursement. If the secretary determines that the taxpayer has an enforceable right to reimbursement, which the taxpayer is not actually receiving, the secretary shall so rule. Within thirty days of receipt of notice of such ruling the taxpayer shall have the right to appeal such ruling to the Louisiana Board of Tax Appeals which board shall determine in open meeting whether there is sufficient evidence to support the ruling of the secretary. If the board determines that there is not sufficient evidence it shall overrule the secretary and the taxpayer shall not be required to take any other action in order to receive the tax credit provided by this Section. If the board determines that there is sufficient evidence, the taxpayer shall thereafter have a period of ninety days within which to institute any administrative or judicial proceedings necessary to assert such right to reimbursement. The taxpayer shall pursue such administrative or judicial proceedings with due diligence. At all times prior to commencement of such administrative or judicial proceedings and during the pendency thereof, and during any appeals therefrom, the taxpayer shall continue to be entitled to the credit provided in this

Section; provided that if no action is taken by the taxpayer to assert the right to reimbursement within ninety days no further credit shall be granted and the state shall have the right to recover from the taxpayer any credits granted prior to the expiration of such time. If it is determined in any administrative proceedings that a taxpayer has no right to such reimbursement, then the taxpayer shall not be entitled to continue receiving the credit allowed by this Section, unless the taxpayer within the time allowed by applicable law seeks judicial review of such administrative determination and pursues such judicial review to a final and unappealable judgment. If the administrative or judicial determination establishes that the taxpayer has an enforceable right to reimbursement of the taxes levied pursuant to R.S. 47:1301 through 1307, and if the taxpayer is so reimbursed, then such taxpayer shall be liable to the state for additional severance taxes equivalent to the amount of taxes levied under R.S. 47:1301 through 1307 for which such taxpayer has received reimbursement. The taxpayer shall also pay to the state interest on such taxes at the rate prescribed in R.S. 47:1601, accruing from the date on which the credit attributable to such taxes was taken to the date of final payment but only to the extent of any interest which the taxpayer has itself received on the amount of reimbursement.

C. The credit allowed by this Section shall not affect the percentage allocation of severance tax proceeds otherwise due to any parish, and the secretary of the Department of Revenue and Taxation, with the concurrence of the state treasurer shall, by regulation, establish such procedures as may be deemed necessary to provide therefor.

D. The secretary of the Department of Revenue and Taxation shall promulgate rules and regulations necessary for the implementation and administration of the tax credit provided for herein.

Section 2. Notwithstanding the provisions of R.S. 47: 1351, the treasurer shall, after any funds have first been deposited to the credit of the Bond Security and Redemption Fund, pay into the general fund, from the total proceeds of the first use tax authorized by R.S. 47:1301 through 1307, such amounts as are necessary to fully reimburse said general fund for tax credits granted pursuant to this Act.

Section 3. Tax credits authorized by this Act shall not be granted until there has been a final decision upholding the validity of the first use tax authorized and levied pursuant to R.S. 47:1301 through 1307, except to the extent that taxes levied pursuant to said Part are collected without either protest or suit for recovery filed directly by the person claiming the credit. In the event that tax credits authorized under this Act are granted, the recipient thereof shall be deemed to have waived his right to recovery of any taxes paid and collected pursuant to R.S. 47:1301 through 1307 to the extent of the tax credit granted.

Section 4. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

Section 5. All laws or parts of laws in conflict herewith are hereby repealed.

Section 6. The provisions of this Act shall become effective upon the enactment into law of House Bill 768 of the 1978 Regular Session of the Louisiana Legislature.

Approved July 10, 1978.

First Use Tax Trust Fund

ACT NO. 293

HOUSE BILL NO. 767

An Act to amend Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950 by adding thereto a new Chapter to be designated Chapter 16 thereof to contain a Part II containing Section 1351, to create and provide for the First Use Tax Trust Fund in the state treasury as a special and irrevocable trust fund for the proceeds to be derived from a first use tax and any new or alternate tax on the same resources; to establish certain accounts within said trust fund to be used for state debt retirement, redemption of outstanding debt, capital improvements of the barrier islands, reefs, and shores of the coastline; and to provide for reimbursement to the general fund for certain tax credits.

Be it enacted by the Legislature of Louisiana:

Section 1. Part II of Chapter 16 of Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950 containing Section 1351 is hereby enacted to read as follows:

Part II. Use Proceeds

SUBPART A. FIRST USE TAX TRUST FUND

§ 1351. Creation

A. (1) The First Use Tax Trust Fund is hereby created in the state treasury as a special and irrevocable trust fund for the deposit of the proceeds, and investment income derived therefrom, of the first use tax imposed by law in 1978 or thereafter and any new or alternative tax hereafter imposed by law on uses of those resources subject to any such tax. Out of the first proceeds of the first use tax the treasurer shall pay into the State General Fund such amounts as are determined by the secretary of the Department of Revenue and Taxation to be necessary to fully reimburse the State General Fund for monies lost to that fund by reason of the tax credits granted by law

which are related to the imposition of the first use tax. The remainder of such tax proceeds shall be credited to the following accounts, which are hereby created within the First Use Tax Trust Fund, and shall not be deposited in the Bond Security and Redemption Fund or the State General Fund.

(2) Distribution; debt accounts. Seventy-five percent of the proceeds, and all investment earnings derived therefrom, shall be deposited in the Initial Proceeds Account and the Debt Retirement and Redemption Account, which are hereby created, in the following manner:

(a) Initial Proceeds Account. From this portion of the proceeds of the tax, amounts shall be credited to the Initial Proceeds Account until the sum of five hundred million dollars has been so credited. The sum of five hundred million dollars credited to this account from the proceeds of the tax shall be maintained in that amount at all times and, except for investment and except as provided in Paragraph C of this Section, monies in the Initial Proceeds Account shall not be used for any purpose. Monies in this account shall be invested, in accordance with law, and the investment earnings shall accrue to that account.

(b) Debt Retirement and Redemption Account. All proceeds of this portion of the tax over and above the amount required to be credited to and be maintained in the Initial Proceeds Account shall be credited to the Debt Retirement and Redemption Account. Monies in this account shall be invested, and the investment earnings shall accrue to that account. Except for investment, monies in the Debt Retirement and Redemption Account shall be used solely to purchase, in advance of maturity, on the open market any outstanding obligations of the state, or to call, pay, or redeem in advance of maturity any outstanding bonds, notes, or other evidences of state debt, or both. No purchase or redemption of state debt shall be made unless the purchase or redemption results in interest savings to the state. The methods by which this

Section shall be implemented shall be determined by the state treasurer, with concurrence of two-thirds of the members of the State Bond Commission, acting in open session.

(3) Distribution conservation account. Twenty-five percent of the proceeds, and all investment earnings derived therefrom, shall be deposited in the Barrier Islands Conversation Account. The monies in the Barrier Islands Conservation Account shall be invested and the investment earnings shall accrue to that account. Except for such investment, monies in this account shall be used exclusively to fund capital improvement projects designed to conserve, preserve, and maintain the barrier islands, reefs, and shores of the coastline of Louisiana. Only such capital improvements as are contained in the comprehensive capital budget adopted by the legislature each year shall be so funded.

B. The state treasurer shall invest all monies in the accounts created by Subsection A hereof in accordance with the laws governing the investment of idle funds of the state.

C. If the state treasurer determines that the best interest of the state would be served, but only if the Debt Retirement and Redemption Account is not funded or for any reason is depleted, the treasurer, with concurrence of two-thirds of the members of the State Bond Commission, acting in open session, may expend such portion of the investment earnings in the Initial Proceeds Account as are not necessary to provide the balance of five hundred million dollars in the Initial Proceeds Account required by Subsection A hereof for any purpose for which the Debt retirement and Redemption Account may be used.

D. The funds deposited in the First Use Tax Trust Fund shall be considered escrowed and shall not be used for any of the purposes enumerated herein until the proceeds of the first use tax are determined to be available for such uses by the treasurer, with concurrence of two-thirds of the members of the State Bond Commission acting in open session. If by final action of a court of last resort the

tax held in escrow in the state treasury is held to be invalid as to any taxpayer who paid the tax, the taxes paid, with interest accrued thereon, shall be repaid to the taxpayer.

E. The secretaries of the Department of Wildlife and Fisheries, the Department of Natural Resources, and the Department of Transportation and Development shall meet and annually make recommendations to the governor as to capital improvement projects designed to conserve, preserve, restore, and maintain the barrier islands, reefs, and shores of the coastline of the state. The governor shall place such of those projects as he deems to be in the best interest of the state in the comprehensive capital budget for consideration by the legislature. Only those projects approved by the legislature shall be funded.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

Section 4. The provisions of this Act shall remain in full force and effect unless expressly repealed.

Approved July 6, 1978.

Tax Credits To Operators Of Electric Generating Plants and Natural Gas Distribution Services

ACT NO. 599

HOUSE BILL NO. 1128

An Act to amend Title 47 of the Louisiana Revised Statutes of 1950 by adding a new Section designated as Section II, relative to tax credits and tax warrants to operators of electric generating plants and natural gas distribution services municipally owned or regulated, or regulated by the Louisiana Public Service Commission and other affected consumers; to provide the basis for such credit or warrant and the amount; to provide for rules and regulations; and to provide otherwise with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. Section II of Title 47 of the Louisiana Revised Statutes of 1950 is hereby enacted to read as follows:

§ II. Tax credit for electric and natural gas service

A. Recognizing that the state of Louisiana must depend upon natural gas produced in the federal domain of the outer continental shelf as a supplement to its declining domestic supply, and recognizing that this natural gas is regulated exclusively by agencies of the federal government and is therefore outside of the regulatory jurisdiction of the state of Louisiana, and that the necessarily higher transportation and marketing costs for such natural gas results in higher fuel costs for utilities and industries within the state dependent thereon, the following tax credits, being deemed fair and in the best interest of the state, are hereby authorized.

B. Every electric generating plant and natural gas distribution service municipally owned or regulated, or regulated by the Louisiana Public Service Commission and every direct purchaser of natural gas from the owner of the natural gas, other than an owner of natural gas regulated by a municipality or the state, for

consumption only by such purchaser, shall be allowed a direct tax credit against any tax or combination of taxes, other than severance taxes, owed to the state, upon showing that fuel costs for electricity generation or natural gas distribution or consumption have increased as a direct result of increases in transportation and marketing costs of natural gas delivered from the federal domain of the outer continental shelf and upon which such entities are dependent for a portion of their supply. Increased transportation and marketing costs shall not include increases in wellhead prices or increases attributable to inflation factors. In the event that the increase in fuel costs exceeds the tax or combination of taxes owed to the state, every such electric generating plant, natural gas distribution service or other affected purchaser shall be issued tax warrants in amounts not to exceed in the aggregate the difference between the increase in the fuel costs and the tax or taxes owed to the state, which tax warrants may be used in the payment of any tax or combination of taxes owed to any parish, municipality, political subdivision or other taxing authority of the state. Tax credits and warrants shall be issued annually hereunder and shall not exceed two million dollars in the aggregate. No electric generating plant, natural gas distribution service, or other affected purchaser shall be issued tax credits or warrants totaling less than two hundred fifty dollars annually, except that increased costs totaling less than the minimum credit established herein may be carried forward and accumulated for three years from the year in which the increased costs occur in order that the applicant may utilize the tax credit authorized herein prior to the end of the prescriptive period otherwise set forth in this Title. In the event that total increased fuel costs exceed two million dollars in the aggregate, the Secretary of the Department of Revenue and Taxation shall issue tax credits and warrants based on a formula to be fixed by regulation which shall insure each qualifying applicant a proportionate share of the maximum tax credits established herein.

C. The secretary of the Department of Revenue and Taxation shall promulgate rules providing for the determination of the amount of any tax credit or tax warrant provided for herein and for administration of the provisions of this Section.

D. The state shall have a right of recovery of tax credits granted pursuant to this Section in the event that increased transportation and marketing costs for which credits are granted hereunder are reimbursed or refunded for any reason to any entity receiving the credit.

Section 2. Tax credits or tax warrants authorized under this Act shall apply to gas distributed or consumed during the twelve month period subsequent to 7:00 A.M. on July 1, 1979, and each succeeding twelve month period thereafter and shall be verified and issued by the secretary of the Department of Revenue and Taxation on September 15, 1980 and every September 15 of each year following. Tax credits or tax warrants issued under this Part shall be dated no later than September 15 of the year of issuance and the credits or warrants issued hereunder must be utilized by September 15 of the year next following.

Section 3. In the event that the secretary of the Department of Revenue and Taxation issues tax credit warrants for the payment of taxes owed to a parish, municipality, or other political subdivision, the legislature shall include in its next regular session an appropriation to reimburse the parish, municipality, or other political subdivision in an amount not to exceed total tax credit warrants issued hereunder.

Section 4. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or applications, and to this end the provisions of this Act are hereby declared severable.

Section 5. All laws or parts of laws in conflict herewith are hereby repealed.

Section 6. The provisions of this Act shall become effective on July 1, 1979.

Approved July 12, 1978.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Number 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

VERSUS

STATE OF LOUISIANA,

Defendant

MOTION TO DISMISS
and
BRIEF IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

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October 22nd, 1979

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Number 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

VERSUS

STATE OF LOUISIANA,

Defendant

MOTION TO DISMISS

Defendant, the State of Louisiana, moves the Court to dismiss the Complaint for the reasons that (1) the Plaintiff States have been unable to demonstrate sufficient standing to invoke the original jurisdiction of this Court, and (2) there is now a new and additional state court action, pending in the Louisiana courts, that provides an appropriate forum in which all interested parties may appear and in which all the *issues* tendered here by the Plaintiff States may be expeditiously litigated. That state forum also provides an opportunity for an authoritative construction and interpretation of the new Louisiana First Use Tax statute, LA R.S. 47:1301-07, by the

Louisiana Supreme Court. Such a definitive delineation of this new and complex statute conceivably may render it unnecessary to resolve some, if not all the constitutional issues now pressed upon this Court, at least in their present formulation.

Two significant developments have occurred since this Court's order of June 18, 1979, allowing the filing of the Complaint by the Plaintiff States. Those events underscore and augment the appropriateness of dismissing the Complaint that has been filed. As more fully set forth in the accompanying brief, those events are:

(1) On August 28, 1979, some seventeen private pipeline companies filed in this Court a "Motion for Leave to Intervene as Plaintiffs and to File Complaint" in this original proceeding, No. 83, instituted by the Plaintiff States. The brief accompanying that motion (pages 12-13, 23), as well as the proposed complaint (page 29, paragraph 3), assert that it is the private pipeline companies, not the Plaintiff States, upon whom falls the "legal incidence" of the Louisiana First Use Tax in question, and that their "direct interests" in this controversy are not adequately represented by the Plaintiff States.

Apart from the fact that this Court's original jurisdiction does not extend to such a proposed complaint and claims by private pipeline companies against a sovereign State, the intervention papers conclusively demonstrate two things: (a) the real parties in interest in this state use tax controversy are the pipeline companies upon whom the "legal incidence" of the tax falls; and (b) the Plaintiff States represent only the ultimate gas consumers within those States, consumers who have only a remote and indirect interest in the tax laid upon the pipeline companies.

(2) On June 22, 1979, these same seventeen private pipeline companies filed an action in a Louisiana State Court

against the State of Louisiana and its tax officials, alleging that the Louisiana First Use Tax is unconstitutional for precisely the same reasons that are asserted before this Court in the Plaintiff States' Complaint and in the proposed complaint of the private pipeline companies. Docket No. 225,553, Nineteenth Judicial District Court in and for East Baton Rouge Parish, Louisiana. The Plaintiff States are free to intervene or otherwise participate in that state court proceeding to assert and protect whatever interests they may have. Already this state court action is at issue and thus ready for prompt development and discovery concerning the many facts that are essential to a delineation and resolution of the federal constitutional issues so identical with those now being prematurely pressed upon this Court.

These factors combine to render appropriate the dismissal of the Complaint of the Plaintiff States, particularly since this Court can now be assured that there is "no want of another suitable forum," *Massachusetts v. Missouri*, 308 US 1, 19 (1939), and that there now is a "pending state-court action [that] provides an appropriate forum in which the *issues* tendered here may be litigated," *Arizona v. New Mexico*, 425 US 794, 797 (1976).

Moreover, since the pleadings put before this Court do not reflect the constitutional issues that may survive a definitive interpretation and construction of the Louisiana First Use Tax statute by the Louisiana Supreme Court, the attempt by the Plaintiff States and others to secure a summary kind of judgment on the pleadings before this Court is misplaced. Until the statute has been authoritatively construed and possibly limited by the Louisiana court, no one can safely say what the precise constitutional issues are or will be. And an essential ingredient of the Louisiana court's articulation of the reach of the statute will be the discovery and assessment of the manifold facts as to the impact and effect of the Louisiana statute, as

well as its legislative purpose and history.

For all these reasons, developed at greater length in the accompanying brief, the State of Louisiana respectfully urges that this Motion to Dismiss be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Number 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

VERSUS

STATE OF LOUISIANA,

Defendant

BRIEF IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

By this brief, the State of Louisiana submits that its Motion to Dismiss should be granted and that the Plantiff States' Motion for Judgment on the Pleadings should be denied.

Out of the plethora of complaints, motions and briefs that have marked this original proceeding to date, two critical considerations emerge:

(1) It has become apparent beyond doubt that this tax controversy between seventeen pipeline companies and the State of Louisiana cannot and does not fall within the original jurisdiction of this Court. The Plaintiff States simply have no standing in this Court to assert and to adjudicate the pipelines' constitutional objections for the tax laid upon them by Louisiana. Moreover, since the pipelines have recently filed a tax refund suit in Louisiana that raises the identical objections, the availability of that forum makes it unnecessary to entertain this original proceeding any longer. Those are the reasons that prompt this Motion to Dismiss.

(2) The major constitutional issues that the Plaintiff States would have this Court resolve summarily on the pleadings are just not ready for resolution. As this brief demonstrates in Part III, the Plaintiff States have asserted a misleading, incorrect and confused version of the constitutional facts respecting the nature and impact of the Louisiana First Use Tax. This in turn causes the entirety of their constitutional arguments to be out of focus.

Any suggestion that this Court summarily adjudicate these important constitutional claims upon such factually faulty pleadings is impermissible. This Court does not sit to render constitutional rulings without first being assured that the facts which underlie the constitutional claims have been fully and accurately developed. See, e.g., *Townsend v. Sain*, 372 US 293, 312 (1963). If this Court determines to proceed with this original proceeding, these constitutional facts must be developed before a Special Master, as the State of Louisiana has suggested. But if the Court disagrees with that suggestion and determines that the constitutional questions are ready for consideration at this time, the State of Louisiana respectfully requests an opportunity to brief and orally argue those questions fully.

I.

THE JURISDICTIONAL AND STANDING DEFECTS IN THIS ORIGINAL PROCEEDING

The proposed complaint that the seventeen private pipeline companies seek to file in this Court brings into sharp focus the critical fact that the real parties in interest in this use tax controversy are the pipeline companies upon whom the incident of the Louisiana tax is laid. That fact has two consequences: (1) it lays bare the paucity and remoteness of the Plaintiff States' standing to bring this original action, and (2) it underscores the absence of any original jurisdiction in this Court to hear and determine a tax controversy brought against a sovereign State by private citizens of other States who are the only real parties in interest.

These consequences can best be appreciated by considering them in reverse order.

1. NEITHER ARTICLE III NOR 28 U.S.C. §1251 CONFERS ANY ORIGINAL JURISDICTION ON THIS COURT TO ENTERTAIN AN ACTION BROUGHT AGAINST A SOVEREIGN STATE BY CITIZENS OF OTHER STATES.

Protesting that their "direct interests" in this tax controversy with Louisiana are not fully or adequately represented by the Plaintiff States, the seventeen private pipeline companies have sought leave to intervene before this Court for the purpose of filing an independent complaint against the State of Louisiana. The practical justification for seeking such leave is said to be that the pipeline companies — rather than the Plaintiff States—are the only ones "liable for the taxes imposed by the First Use Tax statute" (proposed complaint, page 29, paragraph 3).

There can be no quarrel with the contention of the pipeline companies that they bear the legal incidence of the use tax in question. See *Arizona v. New Mexico*, 425 US 794, 797-798 (1976).[1] For that very reason, they are the real parties in interest in this tax controversy. But that fact does not suffice to confer original jurisdiction on this Court to consider the tax claims against a sovereign State by private citizens of other States who are the real parties in interest. The original jurisdiction of this Court ultimately turns on the language of Article III, not upon the degree of interest that a private party may have in a controversy with another State.

Preliminarily, it must be noted that Congress has not sought to recognize any original jurisdiction in this Court over suits brought against a State by citizens of another State. Sections 1251 (b) (3) acknowledges only that this Court shall have original but not exclusive jurisdiction over "actions or proceedings by a State against the citizens of another State or against aliens." Nothing is said about a reverse-type jurisdiction, i.e., actions against a State by citizens of another State.

The answer to that jurisdictional question is found in Article III, Section 2, Clauses 1 and 2[2]—the very provisions that the private pipeline companies propose as a basis for invoking this Court's original jurisdiction over their putative Complaint in Intervention (page 28, paragraph 1). Reading those provisions of Article III, this Court has said (*United States v. Texas*, 143 US 621, 643-644 [1892]),

> ". . . [T]hese words do not refer to suits brought against a State by its own citizens or by citizens of other

1. The Court there stated: "In denying the State of Arizona leave to file, we are not unmindful that the legal incidence of the electrical energy tax is upon the utilities."

2. Clause 1 extends the judicial power of the United States to controversies "between a State and Citizens of another State." Clause 2 defines the original jurisdiction of this Court to include all cases "in which a State shall be Party."

> states, or by citizens or subjects of foreign states, even where such suits arise under the Constitution, laws, or treaties of the United States, because the judicial power of the United States does not extend to suits of *individuals* against states."

When this Court attempted to read those Article III words to permit this Court to exercise original jurisdiction over private citizens' suits against a State, *Chisholm v. Georgia*, 2 Dallas 419 (1793), the Eleventh Amendment was quickly adopted to overrule that reading. In its exhaustive opinion on the impact of the Eleventh Amendment, *Monaco v. Mississippi*, 292 US 313, 329 (1934), this Court observed that,

> "To suits against a State, without her consent, brought by citizens of another State or by citizens or subjects of a foreign State, the Eleventh Amendment erected an absolute bar. Superseding the decision in *Chisholm v. Georgia, supra*, the Amendment established in effective operation the principle asserted by Madison, Hamilton, and Marshall in expounding the Constitution and advocating its ratification. The 'entire judicial power granted by the Constitution' does not embrace authority to entertain such suits in the absence of the State's consent."

The pipeline companies have suggested in their response to the opposition to their intervention motion (pages 3-4), that Louisiana has somehow waived its Eleventh Amendment immunity and thus consented to be sued in this Court pursuant to this Court's Article III original jurisdiction. Reference is made in this respect to LA R.S. 47:1576, which creates a tax refund cause of action and acknowledges that such a legal remedy, including one that seeks a refund because the state tax statute allegedly violates the Federal Constitution, may be pursued in any state court or "in any case where jurisdiction is vested in any of the courts of the United States."

If that statutory provision were construed to constitute a waiver or a consent by Louisiana to suit by a private citizen of another State in the Supreme Court of the United States, — "a grave constitutional question would immediately arise." *California v. Arizona*, _____ US _____, 59 L. Ed. 2d 144, 150 (1979). None of the *Monaco* line of cases has ever suggested that the consent doctrine seemingly embedded in the Eleventh Amendment could be applied to a consent addressed to an exercise of this Court's original jurisdiction as defined by Article III. If Article III does not confer original jurisdiction on this Court over a private citizen's suit against a sovereign State, it would appear that no amount of consent or waiver could overcome that constitutional limitation.

Fortunately, that constitutional problem need not here be addressed. Fairly read, the Louisiana statute does not purport to consent to every kind of action brought in any federal or state court involving the validity of a Louisiana tax statute. It clearly does not consent to a declaratory judgment suit in any court, such as the pipeline companies propose filing in this Court. And it makes no mention of consenting to the institution of an original action in this Court. By its terms, LA R.S. 47:1576 only creates a remedy at law for recovery of taxes which have been paid under protest, and thus the State's consent only goes to such a tax refund suit. It is further limited by its terms to actions in any state or federal court having *jurisdiction of the parties and subject matter*. In discussing the companion statute, LA R.S. 47:2110, the Fifth Circuit has recently placed those statutes in proper prospective. "By its own terms, the statute is applicable only if federal court jurisdiction is otherwise vested." *United Gas Pipe Line Co. v. Whitman*, 595 F. 2d 323, 330 (1979).

There exists no recorded instance where this Court has exercised its Article III original jurisdiction allowing a private

citizen to sue a sovereign State premised upon a consent to such jurisdiction by the State. But the Louisiana consent statute in question does not purport to consent either to the type of declaratory action here proposed or to the exercise of this Court's original jurisdiction in contravention of Article III limitations.

2. NOT BEING THE REAL PARTIES IN INTEREST, THE PLAINTIFF STATES LACK ADEQUATE STANDING TO INVOKE THIS COURT'S ORIGINAL JURISDICTION.

The real parties in interest in this tax controversy are the private pipeline companies. They have sought to assert and protect that direct interest by moving to intervene in this Court in order to replace the Plaintiff States' Complaint with one of their own, one that will adequately reflect those private interests.

As has been shown above, the original jurisdiction conferred on this Court by Article III does not encompass such a private cause of action against a sovereign State. But that jurisdictional defect aside, the very effort of the private pipeline companies to displace the Plaintiff States as the real parties in interest before this Court exposes the frailty and tenuousness of the States' interests. It has now become an established proposition that the States' standing rests solely on an indirect interest in the tax controversy between the private pipeline companies and the State of Louisiana.

The State of Louisiana, in other words, has imposed no use tax on the Plaintiff States to the extent that any of them may be consumers of the gas processed in Louisiana. Nor has Louisiana imposed any such use tax on the private gas consumers residing in any of the Plaintiff States.

Indeed, to the extent that such gas consumers may be

said to be injured by the higher prices they now pay for gas transported from Louisiana, that injury has not been caused by the assessment of the Louisiana First Use Tax on the private pipeline companies. The cost of that tax has been passed on to consumers solely because the private pipeline companies have so willed it. And that pass-on has occurred with the approval and authorization of the Federal Energy Regulatory Commission, acting pursuant to the Federal Natural Gas Act and the Natural Gas Policy Act of 1978. Louisiana has played no part in so transferring to the consumers the cost of the tax assessed on the pipeline companies. There are no allegations to the contrary in any of the motions and briefs before this Court.

All of this being true and uncontested, the following conclusions can be drawn respecting the standing of the Plaintiff States to pursue their Complaint before this Court:

(a) The Plaintiff States have brought this action in part in their purported proprietary capacity as gas consumers, alleging that their gas consumption bills have been increased as a result of the passing on to consumers of the Louisiana First Use Tax imposed on the pipeline companies. The question thus becomes whether the injury for which these consumer States seek redress gives rise to any recognized cause of action under some statute or common law principle. *Hawaii v. Standard Oil Co.*, 405 US 251, 259 (1972).

The short answer is that no such cause of action has been recognized in American law, and none is even alleged by the States. The price one pays for gas or any other commodity contains a host of "hidden" taxes and costs that the manufacturer or seller has succeeded in passing on to the consumer. But no court has ever suggested or held that the consumer thereby has a cause of action protesting the validity of all or any of these "hidden" taxes. There is no need to recog-

nize such a cause of action as long as the party upon which the tax is directly laid—the taxpayer—is capable of challenging the validity of any tax that has been added to the price of the commodity. Here, of course, the tax paying pipeline companies have shown themselves to be quite capable of protesting the Louisiana First Use Tax and of doing so in the proper forum, the Louisiana state courts.

Moreover, it cannot be said that the injury for which these States have sought redress "was directly caused by the action of another State." *Pennsylvania v. New Jersey*, 426 US 660, 663 (1976). The increase in the price of gas was not "directly" caused by the imposition of the Louisiana First Use Tax on the pipeline companies. That so-called injury was "directly" caused by the refusal of the pipeline companies to absorb the tax laid upon them and by the action of the Federal Energy Regulatory Commission in approving a passing-on to the consumers of this tax.

In sum, as consumers the States have demonstrated no cause of action for any injury that is so indirectly traceable to the actions of Louisiana. The States have placed themselves in the untenable position of trying to litigate as volunteers the tax claims of some seventeen private pipeline companies. Cf. *Pennsylvania v. New Jersey, supra*, 665.

This Court's decision in *Oklahoma v. Atchison, T. & S. F. R. Co.*, 220 US 277 (1911), stands as a complete bar to the maintenance of such a "volunteer" action. The Court there held that Oklahoma had no standing or interest in its corporate capacity to invoke the Court's original jurisdiction to seek an injunction against a railroad that was charging allegedly unreasonable freight rates to shippers doing business in Oklahoma. The State of Oklahoma in its corporate capacity, said the Court (at page 286),

> ". . . [W]ould have no such interest in a controversy of that kind as would entitle it to vindicate and enforce the rights of a particular shipper or shippers, and, incidentally, of all shippers, by an original suit brought in its own name, in this court, to restrain the company from applying the Kansas rates, as such, to shippers generally in the local business of Oklahoma."

The Court added that Oklahoma had "no direct interest in the particular property or rights immediately affected or to be affected by the alleged violation of such laws." And so in the instant case, the Plaintiff States have "no direct interest" in the property rights of the seventeen pipeline companies that are "immediately affected" by the imposition of the Louisiana First Use Tax.[3]

(b) The Plaintiff States acquire no greater standing to bring this action as *parens patriae* for "the citizens of each plaintiff state" who purchase or receive "natural gas supplies . . . delivered by interstate natural gas pipeline companies who will be subject to the tax and who will collect such tax from Plaintiff States and their citizens." (Paragraph XV of Complaint).

It is immediately obvious that the State's *parens patriae* standing suffers the same deficiencies that mark the State's proprietary standing. The citizen consumer of natural gas in these States have no recognizable legal interest in any "hidden" tax or cost that is integrated into the price paid for the gas purchased, at least where there is an identifiable taxpayer upon whom such a tax is directly laid and who is capable of protesting the validity of the tax. As the Solicitor General's *amicus* brief has acknowledged (page 9), the tax in this case "is not imposed on the citizens of the complaining states, but its economic burden falls primarily upon them in the form of

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3. Paragraph XI of the Complaint filed by the Plaintiff States concedes that it is the "interstate pipelines upon whom the [Louisiana] tax will be imposed."

higher rates passed through to them by the tax-paying producers and pipelines."[4]

But such an indirect "economic burden," a burden shared only by those citizens who use or purchase gas, has never been deemed the kind of general, direct injury to a state's entire economy, or the health and welfare of its citizens, that will support *parens patriae* standing. Cf. *Georgia v. Pennsylvania R. R.*, 324 US 439 (1945); *Hawaii v. Standard Oil Co.*, 405 US 251 (1972). While there are elements of injury to the gas consuming citizens who must pay higher prices, with perhaps some general resulting impact upon a state's economy, the injury itself must be directly traceable to the actions of the defendant State. And *parens patriae* standing to assert indirect injuries to the citizens of a State becomes even less tenable when there is "a more appropriate party or parties capable of bringing the suit," *Commonwealth of Pennsylvania v. Kleppe*, 533 F. 2d 668, 675 (App. D. C. 1976), to assert the direct injury to those directly affected by the tax.

It thus becomes apparent that the States have no standing, either proprietary or *parens patriae*, to assert in this Court a claim that a "hidden" tax passed on to all gas consumers is unconstitutional. That claim is being made by the taxpayers upon whom the "hidden" tax has been directly laid.

II.

THE STATE COURT IS AN APPROPRIATE FORUM FOR ALL PARTIES TO LITIGATE THE ISSUES TENDERED IN THIS PLEADING

This case primarily involves a question as to the constitutionality of Act 294 of the 1978 Regular Session of the

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4. The Solicitor General's brief (page 9) also acknowledges that the gas consuming citizens "have no practical remedy against the allegedly unconstitutional exaction." But if that is true, how can the States assert as *parens patriae* such a non-existent "practical remedy"?

Louisiana Legislature, commonly referred to as the "First Use Tax on Natural Gas," and incorporated in the statutes of the State of Louisiana as Chapter 16, Title 47, Section 1301, et seq., of the Louisiana Revised Statutes.

The officials charged with the responsibility of administering and enforcing this statute instituted a declaratory judgment action in the proper State Court in Baton Rouge, Louisiana, seeking a declaration by the Court that the First Use Tax on Natural Gas is "legal, valid and constitutional, all in accordance with its terms, conditions and provisions." Named as defendants in this proceeding were all the parties against whom the legal incident for the tax was levied [including the pipeline companies who have sought intervention here]. After issue was joined, and discovery was commenced, the case was removed to the Federal Court for the Western District of Louisiana and subsequently remanded to the state court, [*Edwards v. Transcontinental Gas Pipe Line*, 464 F. Supp. 654 (1979)], where the case is being actively pursued by all of the parties.

After the remand, the instant case was filed by the Plaintiff States. Numerous pleadings and briefs have been filed. In one of these, the Solicitor General, in discussing the state court proceeding, asserted that "it is even more doubtful that the declaratory judgment action presents an Article III case or controversy, since it appears essentially to request an advisory opinion. In these circumstances, it does not appear that review of the ultimate decision of the Louisiana courts would be available in this Court." [Brief for the United States and the Federal Energy Regulatory Commission as *amici curiae* (as filed on June 12, 1979), Pages 12-13].[5]

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5. Louisiana does not agree with this statement concerning this Court's jurisdiction as it relates to review of an action brought under the Louisiana declaratory judgment act. Additionally, Louisiana does not agree that a decision rendered in a declaratory judgment proceeding is advisory. *Edwards v. Parker*, 332 So. 2d. 175, 180 (1976).

Shortly after the filing of this brief, the Court granted the Motion of the Plaintiff States to file a Complaint. Thereafter, a new state court action was filed which is without the disabling features suggested by the Solicitor General as precluding ultimate review by this Court. This action was brought by the pipeline companies and is in the nature of a refund suit for taxes paid [and to be paid]. The same five issues as raised by the Plaintiff States in this proceeding are being asserted in the state court litigation. It is to be noted that these same five issues are also raised in the complaint these pipeline companies seek permission to file with this Court.[6] This is illustrated as follows:

(See Following Page)

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6. In addition, two other lower court proceedings have been instituted in which these same five constitutional issues have been raised. *Edwin W. Edwards, et al., v. Transcontinental Gas Pipeline Corp., et al.,* Nineteenth Judicial District Court, Louisiana, No. 216,867, filed September 22, 1979 and *Federal Energy Regulatory Commission v. McNamara, et al.,* MD La. Civil Action No. 78-384. Stay order issued January 26, 1979 (see Opinion in the Appendix to this brief) Appealed Fifth Circuit No. 79-1403. Argument date June 26, 1979, the Assignment was vacated and the matter was stayed. This makes a total of three forums where these issues have already been tendered, are being litigated, and in which appropriate relief may be had. The third forum, the tax refund suit, as filed in the State Court by the private pipeline companies on June 22, 1979, *Southern Natural Gas Company, et al. v. Shirley McNamara, et al.,* is undoubtedly the most appropriate forum of these three, this Court having held that this specific kind of refund procedure in Louisiana is an appropriate remedy justifying federal court abstention, *Great Lakes Dredge & Dock Co., v. Huffman,* 319 US 293 (1943).

	THE CAUSES OF ACTION AS ALLEGED IN THE PLAINTIFF STATES' COMPLAINT HEREIN		THE STATE COURT REFUND PETITION AS FILED BY THE PIPELINE COMPANIES	THE COMPLAINT THE PIPELINE COMPANIES SEEK TO FILE IN THIS COURT
First	That the First Use Tax constitutes an unreasonable burden on interstate commerce	¶¶ XXXIII - XLV	¶¶ 24(a-d) - 25(a-h)	¶¶ 24(a-d) - 25(a-h)
Second	That it conflicts with federal statutes regulating the interstate transportation and sale of natural gas	¶¶ XLVII - LI	¶¶ 32(a-c) - 33	¶¶ 28(a-c) - 29
Third	That as applied to imported gas it violates the Import-Export Clause	¶¶ LIII - LVIII	¶ 34	¶ 30
Fourth	That it impairs the obligation of contracts	¶ LX	¶ 27	¶ 26
Fifth	That it violates the Fourteenth Amendment by depriving the plaintiff States and their citizens the equal protection of the law	¶¶ LXII - LXVI	¶¶ 31(a-b), 35	¶¶ 29(a-b), 31

The total identity of the issues put before this court and put before the Louisiana state court provides a practical opportunity for applying and following the principle epitomized by *Arizona v. New Mexico*, 425 US 794 (1976). That principle recognized that this Court need not and should not exercise its original jurisdiction if there is another forum available where there is jurisdiction over the named parties, where the issues tendered may be litigated and where appropriate relief may be had. See also *Illinois v. City of Milwaukee*, 406 US 91, 93-94 (1972). As the *Arizona* opinion emphasizes, 425 US at 797, a pending state court action is a peculiarly appropriate forum if the "issues" tendered before this Court may be litigated in that state court.

The pending state court action brought by the seventeen pipeline companies fits squarely within the four corners of this prudential principle that overlays this Court's exercise of its original jurisdiction to-wit:

(1) The issues tendered to this Court both by the Plaintiff States and by the putative intervenors, the pipeline companies, are identical to those raised by the pipeline companies in the pending state court tax refund proceeding.

(2) The pending proceeding in the Louisiana state court allows those issues to be litigated in a direct confrontation between the only real parties in interest—the pipeline companies and the State of Louisiana. As indicated in Part I of the brief, it is unlikely that the pipeline companies can ever be made parties to the original proceeding in this Court. But the Louisiana proceeding obviously does afford the pipeline companies the opportunity to be party plaintiffs in a refund suit wherein their real interest can be asserted and adjudicated. And the Plaintiff States, whose indirect interest may well deprive them of standing to pursue this original action in this Court, are free

to intervene or otherwise assert those indirect interests in the pending refund action in Louisiana.

(3) To paraphrase what was said in the *Arizona* opinion, 425 US at 797, if on appeal the Louisiana Supreme Court should hold the First Use Tax unconstitutional, the Plaintiff States and the pipeline companies will have been vindicated; but if, on the other hand, the tax is held to be constitutional, "the issues raised now may be brought to this Court by way of direct appeal under 28 USC §1257 (2)." See *Arizona Public Service Co. v. Snead,* — US —, 60 L. Ed. 2d 106 (1979).

(4) In *Great Lakes Dredge & Dock Co. v. Huffman,* 319 US 293, 296-297 (1943), this Court held that the existence of the Louisiana tax refund procedure that the pipeline companies have here instituted, a procedure stemming from Section 18 of Article 10 of the Louisiana Constitution [now Article VII, Section 3, 1974 Louisiana Constitution], constitutes a sound reason for a federal court withholding any injunctive or declaratory relief against the collection of Louisiana state taxes. In this Court's words, 319 US at 301, in such a suit in the Louisiana courts the taxpayer "may assert his federal rights and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes." No reason is apparent why this Court should not follow the abstention principle embodied in the *Great Lake's* decision by withholding the exercise of its original jurisdiction in this instance.[7]

7. The Solicitor General in Brief for the United States and the Federal Energy Regulatory Commission as *amici curiae* as filed on June 12, 1979, has suggested on Page 4 that "The United States and the Commission are therefore interested in the prompt resolution of the issues presented in the complaint herein." The state court refund suit is a quick and ideal method of resolving the issues herein presented without the necessity of this Court exercising its original jurisdiction. Louisiana procedure permits an expeditious hearing. Once the constitutional facts are assembled, the matter may then bypass the District Court, the Court of Appeal and proceed directly to the Louisiana Supreme Court under its supervisory jurisdiction for a decision on the merits. This has been done where conditions require or justify such action. See *Bates v. Edwards,* 294 So. 2d 532 (1974) and *Edwards v. Parker,* 332 So. 2d 175 (1976).

(5) Finally, the pendency of the state court tax refund suit affords a ready forum for (a) the development of a definitive state court construction and interpretation of the First Use Tax statute, and (b) the development of the essential constitutional facts relating to that binding construction of the state statute. In other words, the whole notion of withholding or postponing federal jurisdiction—including the original jurisdiction of this Court—contemplates that new state "enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality" *Harrison v. NAACP*, 360 US 167, 178 (1959) and "that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law," *Spector Motor Service, Inc. v. McLaughlin*, 323 US 101, 105 (1944) and cases cited. Such factors speak loudly in favor of withholding the exercise of this Court's original jurisdiction until the Louisiana courts have supplied a definitive construction of this new and complex state First Use Tax statute and have developed the essential facts from which to assess the constitutionality of the state court's construction of that statute.

Paraphrasing what was said in the *Spector Motor case*, 323 US at 104, even if the Louisiana First Use Tax statute "hits aspects of an exclusively interstate business, it is for (Louisiana) to decide from what aspect of interstate business she seeks an exaction. It is for her to say what is the subject matter which she has sought to tax and what is the calculus of the tax she seeks. Everyone of these questions must be answered before we reach the constitutional issues . . ."

Because the Complaint of the Plaintiff States rests so much upon "preliminary guesses regarding local law", guesses that are both speculative and often erroneous as to the underlying facts and the statutory reach, this Court should dismiss this original proceeding.

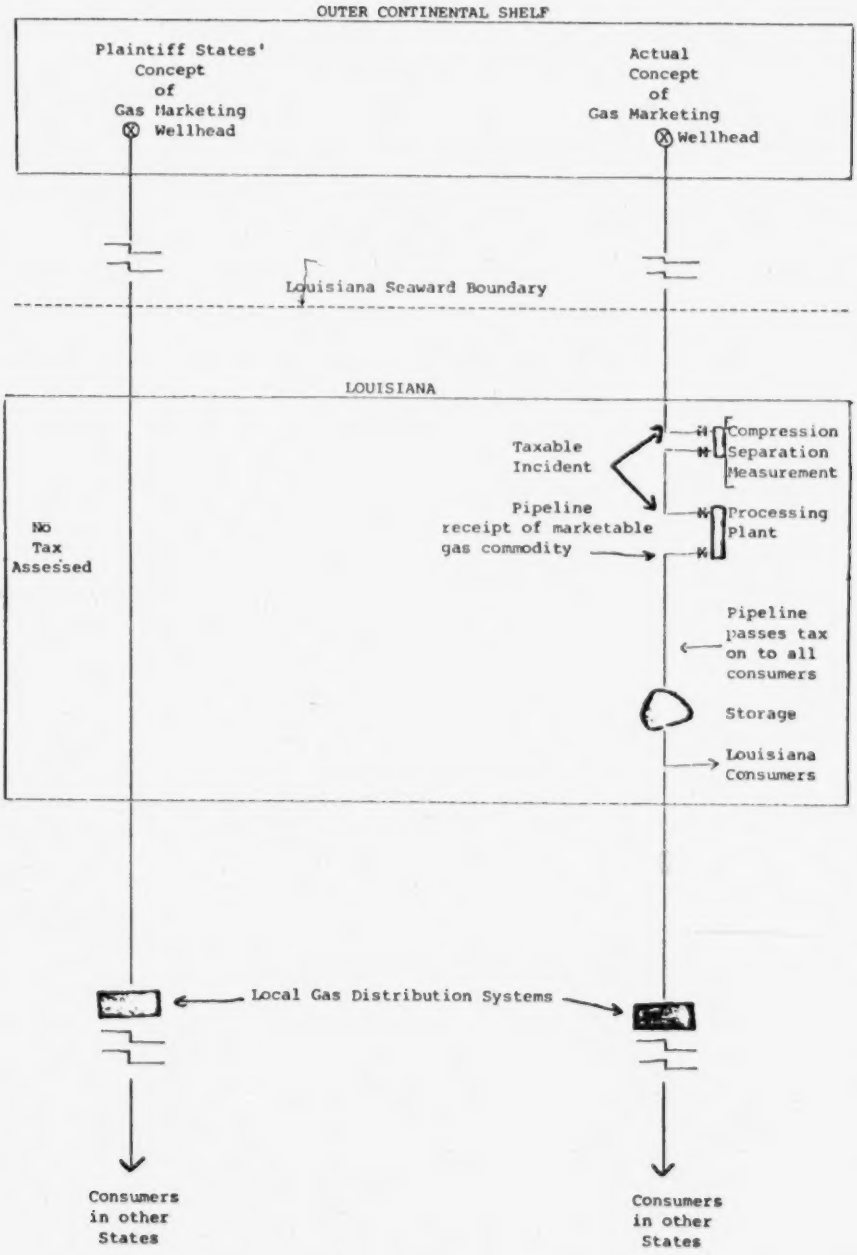
III.

THERE ARE COMPELLING REASONS REQUIRING A FACT DETERMINATION PRIOR TO A CONSIDERATION OF THE MOTION FOR A JUDGMENT ON THE PLEADINGS

The Plaintiff States are under the mistaken belief that the gas commodity ultimately delivered to the homes of their citizens for consumption is identical to the raw, or natural, gas resource which originates on the Outer Continental Shelf and from which the standardized consumable commodity is derived. "The form of the gas is not changed in any way because it passes through Louisiana." (Brief of the Plaintiff States in Support of Motion for Judgment on the Pleadings, page 19.) The following diagram clearly reflects that such is not factually correct.

(See Next Page)

FACTUAL DIAGRAM



In fact, the gas in question is not in a standard marketable condition when produced at the wells on the Outer Continental Shelf.[8] It is brought into the State of Louisiana where it is subjected to extensive processing, refinement, treating, dehydration, compression and change in form and content to make the end product economically transportable over long distances under the applicable rate structure, and to enable the pipeline owners to receive only that standardized portion of the BTU content of the original gas stream to which their purchase contract entitles them and the federal rate and regulatory structure requires for delivery to gas customers. At processing plants costing millions of dollars, the product is subjected to changes in temperature, pressure, form, content, value, molecular makeup and potential use. Much of the gas when produced from the Outer Continental Shelf contains excessive water, corrosives and other impurities which must first be removed by a series of mechanical and chemical processes designed to change the pressure and flow characteristics of the original stream, thereby allowing some of the undesired heavier components to be removed. Thereafter, by a series of temperature changes, pressure changes, and the application of other products and chemicals the constituent chemical makeup and BTU content of the gas is drastically altered from its original form. Propane is removed, butane is taken out and ethane is extracted. The gas is enveloped by a varsol oil solution from which it is again cleansed, refined, pressure changed and warmed to normal temperatures. The components thereby removed are distributed to other points for various purposes and the remaining gas, which is then nearly pure methane consisting at this point of approximately one million BTU's per thousand

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8. See dissenting opinion of Justice Clark in *Phillips Petroleum Co. v. State of Wisconsin*, 347 US 672 at 692 (1954), where the need for processing was recognized so as to make the fuel marketable:

> ". . . The processing of the gas at this central gathering plant is necessary to remove hydrocarbons, hydrogen sulphide and other foreign elements in order to permit its use as fuel."

cubic feet, is delivered to the pipeline owners where it is measured, paid for and transported for distribution to ultimate consumers.

At the time of processing, the natural gas stream is owned by the pipeline companies. By private contract, approved by the Federal Energy Regulatory Commission, the pipeline companies assign their interest in some of the components of the gas stream to others, and it is only after the extensive and multitudinous steps of the processing application that the properly constituted marketable portion of the gas is delivered into an interstate system for transportation and distribution. The gas is measured and paid for only at the tailgate of the processing plant where it is a vastly different commodity than that which was produced from the bore hole of the well on the Outer Continental Shelf. Some of the gas is placed into storage fields in Louisiana where it abides until required for seasonal uses by its owner. That product from the Outer Continental Shelf cannot be transported in its original condition to the ultimate consumer at the present price fixed in the rate structure of the pipeline owners by the Federal Energy Regulatory Commission because the additional weight and corrosive characteristics of the original stream would require that vastly greater costs be passed on to the consumer to recompense the pipeline owners for the additional BTU's, compression and line maintenance costs which would occur.

Additionally, and perhaps most importantly, the pipeline purchase costs fixed by private contract and approved by the Federal Energy Regulatory Commission provide only for the payment and receipt of a certain BTU content range, deviation from which would result in ultimate consumers either receiving a commodity which their standardized gas appliances are not designed to burn, thereby creating safety hazards, or receiving a product with a heating value worth far less than the price they are paying. Moreover, the processing incident

itself may only be performed one time. It is not subject to repetitive performance in the several states through which the gas passes en route to its ultimate consumption. Once the water and the impurities have been removed, once the butane has been extracted and the propane and the ethane taken out, it may not again be subjected to those uses for it has then been reduced to the standardized energy product for which the consumers of Plaintiff States are equipped to use.

As was said in the Motion to Dismiss, page 3, "[S]ince the pleadings put before this Court do not reflect the constitutional issues that may survive a definitive interpretation and construction of the Louisiana First Use Tax statute by the Louisiana Supreme Court, the attempt by the Plaintiff States and others to secure a summary kind of judgment on the pleadings before this Court is misplaced. Until the statute has been authoritatively construed and possibly limited by the Louisiana court, no one can safely say what the precise constitutional issues are or will be. And an essential ingredient of the Louisiana court's articulation of the reach of the statute will be the discovery and assessment of the manifold facts as to the impact and effect of the Louisiana statute, as well as its legislative purpose and history."

As has been previously stated, and is now being reiterated, if this Court determines to proceed with this original proceeding, these constitutional facts must be developed before a Special Master, as the State of Louisiana has suggested. But if the Court disagrees with that suggestion and determines that the constitutional questions are ready for consideration at this time, the State of Louisiana respectfully requests an opportunity to brief and orally argue those questions fully.

All the above and foregoing is thus respectfully submitted.

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CERTIFICATE OF SERVICE

I, ROBERT G. PUGH, one of the attorneys for the State of Louisiana in the above-entitled proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 22nd day of October, 1979, I served copies of the foregoing Motion to Dismiss and Brief in Support of Motion to Dismiss and in Opposition to Motion for Judgment on the Pleadings by mailing three copies thereof in duly addressed envelopes, with postage prepaid, to:

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APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

FEDERAL ENERGY REGULATORY COMMISSION,
825 North Capitol Street, N.E.
Washington, D. C. 20426

versus

SHIRLEY McNAMARA,
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CIVIL ACTION
NUMBER 78-384

* * * * * *

E. GORDON WEST, District Judge:

This is a suit brought by the Federal Energy Regulatory Commission, an agency of the United States of America,

seeking a declaratory judgment holding the Louisiana First Use Tax on Natural Gas, La. Rev. Stat. 47:1301-1307, unconstitutional, and seeking also injunctive relief, enjoining the defendants from implementing and enforcing that statute. The defendants are Shirley McNamara, Secretary of the Department of Revenue and Taxation of the State of Louisiana, William J. Guste, Jr., the Attorney General of the State of Louisiana, and Raymond T. Sutton, Commissioner of Conservation and Assistant Secretary for Conservation of the Department of Natural Resources of the State of Louisiana. Plaintiff alleges that it is these defendants who are charged, in the Act, with the duty of implementing and enforcing the First Use Tax on Natural Gas.

Defendants have filed a motion to dismiss for lack of jurisdiction, or in the alternative, to stay these proceedings pending the outcome of a case filed in the State Court seeking similar relief. Also, a motion to intervene as plaintiffs has been filed by approximately 42 natural gas distributors, collectively known as the Associated Gas Distributors. They allege that none of the prospective intervenors are incorporated in the State of Louisiana, and that none of them has a principal place of business in Louisiana. It is these motions that are presently before the Court.

In July of 1978, the Louisiana Legislature, in Regular Session, passed, and the Governor signed into law, a tax statute known as the First Use Tax on Natural Gas. This statute was codified as La. Rev. Stat. 47:1301-1307. By its terms, the First Use Tax becomes effective and enforceable at 7:00 a.m. on April 1, 1979. In general, the First Use Tax is imposed, at a rate of 7 cents per thousand cubic feet, "upon the first occurrence within [Louisiana] of any use * * * of any natural gas upon which no severance tax or tax upon the volume of production has been paid, or is legally due to be paid, to this state or any other state or territory of the United States, or which is not

subject to the levy of any import tax or tariff by the United States as an import from a foreign country." The Act specifically states that it is not a tax on the production, severance or ownership of natural gas produced outside of the boundaries of the State of Louisiana, and that the tax is not upon the natural gas nor upon the property or rights from which it is produced. The tax is stated to be only upon the privilege of performance or allowing the performance, by the owner, of the enumerated actions comprising first use as defined in the statute, within the State of Louisiana.

There are other provisions of the statute which define terms used therein as well as stating the purposes and policies underlying the statute. There are also exclusions, exemptions, enforcement provisions and penalties provided therein.

Since immediately upon passage of the First Use Tax, its constitutionality was being questioned, particularly by certain gas transmission companies who would be subject to it, the Governor of the State of Louisiana, together with Shirley McNamara and William J. Guste, Jr., both defendants in the present suit, initiated a suit in a State Court of competent jurisdiction in Louisiana, seeking a declaratory judgment as to the validity of the First Use Tax. Made defendants in that suit were about 23 gas pipeline or transmission companies who would be subject to the tax if its validity were upheld. That suit was filed on September 22, 1978. On October 20, 1978, those defendants removed that case to this Court, claiming diversity of citizenship and federal question jurisdiction. The plaintiffs moved to remand. For written reasons assigned, a copy of which will be attached hereto as Appendix I [see 464 F. Supp. 654 (1979], this Court granted the motion to remand and that case is now ripe for adjudication by a State Court of competent jurisdiction. The primary reason for the remand was that 28 U. S. C. §1341, the Tax Injunction Act, prohibits this Court from enjoining the assessment, levying, or

collecting of a state tax where a plain, speedy, and efficient remedy may be had in the courts of the State. In the present case, when reduced to its essentials, the very same issues are presented as those presented in the case now in the State Court. The same declaratory and injunctive relief is sought in both cases. Both cases involve the same ultimate question, i.e., whether or not the tax statute passed by the Louisiana Legislature is in violation of federal law and thus invalid.

While their presence may not be deemed necessary to the protection of their interests, nevertheless, the parties to this suit may, if they wish, petition to intervene in the State Court suit. That remedy is available to them if they wish to seek it. At any rate, a determination of the pending State Court suit will either render the issues in this suit moot, or will so narrow any remaining issues in this case that efficient use of judicial time requires that further proceedings in this suit be stayed pending the outcome of the State Court action. To proceed now with this suit in this Court would completely defeat the purpose of the remand of the prior action. Title 28, U. S. C., Section 2201, conferring upon Federal Courts the power to render declaratory judgments, does not supply independent grounds of jurisdiction where none otherwise exist, and is coterminous with the breadth of the Tax Injunction Act, 28 U. S. C. §1341. *Rolls-Royce Ltd., etc. v. United States*, 364 F. 2d 415 (Ct. of Claims—1966); *Lear Siegler, Inc. v. John S. Adkins*, 330 F. 2d 595 (CA 9—1964); *McGlotten v. Connally*, 338 F. Supp. 448 (D.C. D.C.—1972). When the Declaratory Judgment Statute says that the Court "may" declare the rights as between the parties, it does not mean that it "shall" do so. *Solenoid Devices, Inc. v. Ledex, Inc.*, 375 F. 2d 444 (CA 9—1967). That statute is merely an enabling act which confers discretion upon the Court rather than a right upon the litigants. *Green v. State ex rel Faircloth*, 318 F. Supp. 745 (D.C. Fla.—1970).

Plaintiffs seek both declaratory judgment and injunctive relief. Without passing upon the question of whether or not injunctive relief may be granted in a suit seeking a declaratory judgment, and without in any way passing upon questions of jurisdiction or upon the merits of this case, the Court, in the exercise of its discretion, will stay these proceedings pending the outcome of the State Court action.

Those seeking to intervene in this suit do so under Rule 24(b) (2) of the Federal Rules of Civil Procedure. That rule sets forth the requirements for a "permissive" intervention as distinguished from an intervention "of right." Such an intervention is within the sound discretion of the Court to grant or deny. Consideration must be given to the question of whether or not the intervenors' rights can be adequately protected without their presence in the suit, and also to the question of whether or not the addition of a large number of additional parties will unduly delay or unduly complicate the progress of the suit. In view of the Court's decision to stay these proceedings, it is concluded that the rights of the proposed intervenors will in no way be prejudiced by denying intervention at this time. The Court concludes that intervention at this time will tend to unduly burden the record for no justifiable reason. All issues raised by all parties, including those raised by the proposed intervenors, are presently contained in the record, and at the present time the interests of movers for intervention are adequately represented and protected. An order will be entered in this matter granting the defendants' motion to stay proceedings, and denying intervenors' motion to intervene in this suit.

Baton Rouge, Louisiana, January 26, 1979.

/s/ E. GORDON WEST
UNITED STATES DISTRICT JUDGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

BRIEF IN OPPOSITION TO MOTION TO DISMISS

STATEMENT

Rather than respond to the plaintiff states' motion for judgment on the pleadings with the customary brief in opposition,[1] Louisiana has filed a motion to dismiss

[1] While the defendant's current filing is also styled as a brief in opposition to the motion for judgment on the pleadings, it seeks a second bite of the apple by stating that "if the Court disagrees with [the] suggestion [that "facts must be developed before a Special Master"] and determines that the constitutional questions are ready for consideration at this time, the State of Louisiana respectfully requests an opportunity to brief and orally argue those questions fully." Brief in Support of Motion to Dismiss, at 6. The plaintiff states do not oppose oral argument if it would be helpful to the Court in ruling on the motion for judgment on the pleadings; however, they do object to the defendant's request for an opportunity to file a second brief in opposition to the

that merely restates arguments made previously in its brief opposing the plaintiff states' motion for leave to file the complaint.[2] Similarly, all that the defendant does in its supporting brief is reiterate and embellish, with new counsel, its prior contentions (1) that the plaintiff states, because they do not bear the legal incidence of the Louisiana First Use Tax, lack standing to pursue this action in this Court; and (2) that "pending" Louisiana state court proceedings present an appropriate forum for the vindication of the plaintiffs' rights. In its effort to delay the ultimate resolution of this case, the defendant simply ignores the fact that these issues were fully aired in the plaintiff states' brief supporting their motion for leave to file the complaint (at 12-18) and the amici curiae brief of the United States and the FERC (at 8-14), raised in Louisiana's brief in opposition to the plaintiff states' motion for leave to file the complaint (at 7-18), and rejected by this Court when it assumed jurisdiction by its order of June 18, 1979.

Before this Court granted the plaintiff states' motion for leave to file the complaint, for example, it was told:

> It is probable that in the near future other actions challenging the validity of the First Use Tax will be filed in the Louisiana courts by interstate gas pipelines suing for recovery of amounts of the tax paid under protest. La. Rev. Stat. Ann. § 47:1576 (West). The [Federal Energy Regulatory] Commission has authorized interstate

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motion for judgment on the pleadings because of the further delay that would be occasioned by allowing Louisiana another brief on the questions raised by the motion. *See* footnotes 8 & 9, *infra*.

[2] Louisiana waited five weeks after the filing of the plaintiff states' motion for judgment on the pleadings to respond with a motion to dismiss. The current motion of the defendant was filed almost five months after its brief in opposition to the motion for leave to file the complaint and more than two months after Louisiana responded to the merits of the complaint by filing its answer.

> pipelines to pass on in their rates the additional costs for natural gas which the pipelines incur as a result of the Louisiana First Use Tax. As a condition to this authorization, however, the pipelines are required to take all legal actions available to them to determine the constitutionality of the tax.

Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae, at 7. The only thing new presented by the defendant is its report that the understandable prognostication of tax refund litigation has come true.

For the reasons discussed below, the plaintiff states maintain that the defendant's recurring standing argument, the tax refund litigation, and the actions pending when the plaintiff states filed their motion for leave to file the complaint are all insufficient to lead this Court to divest itself of jurisdiction in this case.[3]

ARGUMENT

I.

LOUSIANA HAS OFFERED NO VALID BASIS FOR THIS COURT TO REVERSE ITS DECISION ACKNOWLEDGING THE STANDING OF THE PLAINTIFF STATES.

On June 18, 1979, this Court acknowledged its exclusive jurisdiction over this original proceeding by granting the plaintiff states leave to file their complaint challenging the Louisiana First Use Tax on multiple constitutional grounds. By its order of June 18 the Court acted in the face of Louisiana's brief in opposition, filed May 29, which urged (at 7-18) that the plaintiff states lacked standing.

Now, in a motion to dismiss, Louisiana has reasserted the already rejected position that because the

[3] In this brief, the plaintiff states also respond to the defendant's renewed assertion that certain facts must be developed before a master before the Court considers the questions raised by the plaintiffs' motion for judgment on the pleadings.

legal incidence of the First Use Tax falls on pipeline companies that transmit the gas, these companies are the real parties in interest and the interest of the plaintiff states is too remote to give them standing to maintain this action. Louisiana argues that this conclusion is demonstrated because these companies have since sought to intervene in this proceeding. Motion to Dismiss, at 2. However, the pipeline companies' attempt to intervene *proves* nothing. In *Utah v. United States,* 394 U.S. 89, 92 (1969), for example, this Court suggested that if a private party has a substantial basis for intervening in an original action, intervention may be permissible. Thus, it is ironic that Louisiana maintains that the pipeline companies are the real parties in interest in this case yet denies that they have a right to intervene. Brief in Opposition to Motion for Leave to Intervene, at 3.

In its current brief, Louisiana likewise continues to distort the status of this case and the relevant issues. For instance, the defendant asserts that the pipeline companies seek "to replace" the plaintiff states as the real parties in interest. Brief in Support of Motion to Dismiss, at 11. In reality, as the Court recognized by granting the motion for leave to file the complaint, it is the mammoth economic burden directly imposed by the First Use Tax on the plaintiff states and their economies that gives the plaintiff states standing to bring this suit. *Pennsylvania v. West Virginia,* 262 U.S. 553, 591-92 (1923).[4] Under these circumstances, it

[4] The defendant again misleads the Court with its claim that the plaintiff states have failed to allege that "Louisiana has played [any] part in . . . transferring to . . . [out-of-state] consumers the cost of the tax assessed on the pipeline companies." Brief in Support of Motion to Dismiss, at 12. As the plaintiff states' brief supporting the motion for judgment on the pleadings repeatedly contends, the unique features of the Louisiana First Use Tax force interstate consumers, including the plaintiff states as users of natural gas for

cannot seriously be contended that the plaintiff states are a stand-in or volunteer for the interests of the pipeline companies. *Cf. Oklahoma v. Atchison, Topeka & Santa Fe Railroad,* 220 U.S. 277, 289 (1911).[5]

Undeniably, Louisiana, by levying its First Use Tax, is causing serious injury to the plaintiff states and to the well-being of their economies. Indeed, the tax threatens the viability of gas-consuming industries and harms the economic prosperity of entire regions of the country. Moreover, the gas consuming states have a vital interest in the unimpeded flow of federally regulated natural gas in interstate commerce. The Louisiana tax interferes with this flow and subjects the gas to confiscation as contraband should the tax not be reported or paid. La. Rev. Stat. Ann. § 47:1306B (West Supp. 1979).

> This interference gives rise to a matter of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest, but one which is immediate and recognized by law.

Pennsylvania v. West Virginia, 262 U.S. 553, 592 (1923). Thus, this Court properly concluded in deciding to exercise its original jurisdiction that the interests of the plaintiff states are sufficient to support their standing

governmental purposes, to bear the burden of the tax in the form of higher prices. Brief in Support of Motion for Judgment on the Pleadings, at 9-10, 12, 20-21, 28.

[5] Although Louisiana has cited the *Santa Fe* case for the proposition that the states cannot litigate the tax claims of private parties, Brief in Support of Motion to Dismiss, at 13, this Court has emphasized that the *Santa Fe* case simply bars the state from volunteering as a nominal plaintiff for private grievants. Georgia v. Pennsylvania R.R., 324 U.S. 439, 447 (1945).

in this case. *Georgia v. Pennsylvania Railroad,* 324 U.S. 439, 447 (1945).[6]

Finally, Louisiana has itself effectively recognized the standing of the plaintiff states to bring this action by conceding that the plaintiff states might properly intervene in its courts in the pending proceeding concerning the constitutionality of the tax. Motion to Dismiss, at 3 and Brief in Support of Motion to Dismiss, at 19-20.

For all these reasons, this Court should not reverse its decision acknowledging the standing of the plaintiff states to bring this suit, and the defendant's motion to dismiss should be denied.

II.

NO LOUISIANA COURT IS AN APPROPRIATE OR ADEQUATE FORUM FOR THE PLAINTIFF STATES TO LITIGATE THEIR CLAIMS.

In determining whether this case was appropriate for the exercise of its original jurisdiction, this Court not only gauged the seriousness and dignity of the plaintiff states' claims but also considered the availability of other forums where there might be jurisdiction over the named parties, where the issues tendered might be litigated, and where appropriate relief might be had. *See Arizona v. New Mexico,* 425 U.S. 794, 796-97 (1976).

In its brief in support of its motion to dismiss (at 16), Louisiana, without argument, reiterates its claim that a declaratory judgment proceeding it instituted in a

[6] Moreover, in determining whether a state is the real party in interest in a matter, this Court has said that it will look beyond legal forms to the substance of the claim. Arkansas v. Texas, 346 U.S. 368, 371 (1953). Thus, the fact that the legal liability for the tax falls on the pipeline companies does not undermine this Court's finding that the plaintiff states have an interest that permits them to litigate the constitutionality of the First Use Tax in this Court.

Louisiana state court before this Court exercised its original jurisdiction, in which the plaintiff states are not parties, requires this Court to stay its hand. Enough has been said already on the inadequacy and inappropriateness of that forum. Brief in Support of Motion for Leave to File Complaint, at 15-16; Brief for United States and the Federal Energy Regulatory Commission as Amici Curiae, at 12-13.

Louisiana also asks this Court to dismiss this action because the pipeline companies filed a tax refund suit in a Louisiana state court after the filing of the plaintiffs' motion for leave to file complaint and this Court's decision to exercise its original jurisdiction. This request makes light of this Court's exercise of jurisdiction. It also ignores that whatever state court proceedings occur after this Court's exercise of its original jurisdiction are irrelevant to the conduct and disposition of this case. *Cf. Steffel v. Thompson,* 415 U.S. 452, 462 (1974) (abstention unnecessary in absence of pending state proceedings); *Ex Parte Young,* 209 U.S. 123, 161-62 (1908) ("When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject-matter of inquiry in a suit already pending in a Federal court, the latter court, *having first obtained jurisdiction over the subject-matter,* has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed.") (emphasis added).

More than the time sequence undermines the defendant's argument. The pipeline companies' tax refund suit, mandated by the orders of the FERC, presents a wholly inappropriate and inadequate forum for the vindication of the constitutional claims pressed by the plaintiff states. As pointed out by the United States and the FERC before this Court assumed jurisdiction in this

case, the First Use Tax refund suit mechanism established by Louisiana permits neither injunctive nor declaratory relief against collection of the tax. Brief for United States and the Federal Energy Regulatory Commission as Amici Curaie, at 7.[7] Without such relief, which only this Court may grant, Louisiana will continue to collect millions of dollars in taxes,[8] perhaps for years, at the expense of the plaintiff states as consumers of natural gas and to the irreparable injury to their quasi-sovereign interests in protecting their economies from the enormous impact of the First Use Tax.

Finally, although Louisiana maintains without illustration that this case involves a complicated state tax statute that is uncertain as to meaning and the constitutional issues its raises, several bright lights pierce the defendant's smoke screen. It is apparent on the face of the First Use Tax that this statute effectively imposes a tax on all natural gas that passes through Louisiana from the federal domain to the plaintiff

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[7] Declaratory and injunctive relief are prayed for by the plaintiff states. *See* Complaint, at 27. On the other hand, the pipeline companies' tax refund suit, even if eventually successful, is at best a step removed from the only possible relief it may promise for the plaintiff states, *viz.*, refunds, a remedy this Court has deemed inadequate in the past. FPC v. Tennessee Gas Transmission Co., 371 U.S. 145, 154-55 (1962).

[8] Louisiana may also derive substantial economic benefit at the expense of the plaintiff states simply by prolonging this proceeding, since its present interest rate on refunds is only six per cent per annum. La. Rev. Stat. § 47:1576(A) (West Supp. 1979). As Louisiana State Representative Wilbert J. Tauzin, II, one of the defendant's counsel of record in this Court, has stated:

> So that the total amount that we might be liable for in the event that we should lose the litigation is available for refund of 6% interest. We are likely to make more than 6% interest on it in investments. We are actually going to probably come out a little bit ahead on it.

44 Fed. Reg. 46,293 (Aug. 7, 1979) (footnote omitted).

states; that this tax is, in effect, a local tariff; and that it raises the clearest and most fundamental constitutional issues concerning the relation of the states within the federal union.

If this Court divests itself of its exclusive jurisdiction over this matter, the only other available forum for deciding these fundamental issues is a court of the defendant state. Requiring resort to a Louisiana court, however, would run counter to the rationale for the Court's original jurisdiction over cases involving the states. As this Court has noted, "no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971). As between the courts of the defendant state and this Court, the only suitable forum for deciding the clear and fundamental issues raised in this case is this Court.

The defendant failed at the outset to demonstrate any considerations of convenience, efficiency, or justice that warranted this Court's denial of the plaintiffs' motion for leave to file their compaint. *Massachusetts v. Missouri,* 308 U.S. 1, 19 (1939). The current motion to dismiss does not present any new or unforeseen consideration that suggests this Court erred in its original decision. Indeed, the plaintiff states have amply demonstrated the contrary — that the interests of convenience, efficiency, and justice are best served by this Court's continued assertion of its jurisdiction over this matter. For these additional reasons, the defendant's motion to dismiss should be denied.

III.

NO ADDITIONAL FACTS ARE NECESSARY FOR THIS COURT TO DECIDE PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS.

With simplistic and irrelevant charts, together with distortions of the purposes and operation of the First Use Tax, Louisiana attempts to obscure the obvious point that no facts are needed to resolve the supremacy and commerce clause issues pressed by the plaintiff states' motion for judgment on the pleadings. Brief in Support of Motion for Judgment on the Pleadings, at 39-41. For example, no matter how often Louisiana attempts to justify the relevance of the alleged instate processing of natural gas, this "fact," even if it were proved, would have no bearing on whether federal law precludes imposition of the tax or whether the tax discriminates on its face against interstate commerce.

Moreover, from reading the defendant's brief in support of its motion to dismiss, one would think that the First Use Tax was a tax only on instate processing of natural gas. However, the taxable events under the Louisiana statute are infinitely more nebulous: any "transportation in the state of unprocessed natural gas," any "transfer of possession or relinquishment of control," or any "other acertainable action" triggers the tax. La. Rev. Stat. § 47:1302(8) (West Supp. 1979). The tax is imposed on the total volume of gas and is not apportioned to any particular use. La. Rev. Stat. § 47:1303B (West Supp. 1979). Thus, decisions of this Court accurately characterize the imposition of the First Use Tax on Louisiana's self-styled "uses" as an unconstitutional tax on the interstate transportation of the gas itself. *See Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157 (1954); *East Ohio Gas Co. v. Tax Commission of Ohio,* 283 U.S. 465 (1931).

The defendant's renewed plea that this case be referred to a special master to determine "constitutional facts" already admitted by Louisiana in its answer, decided by this Court, or subject to its judicial notice, is essentially another attempt to deny the plaintiff states speedy and efficient relief and to keep flowing to Louisiana the enormous, ever increasing revenues generated by the First Use Tax.[9] The plaintiff states, as they have urged in both their motion for judgment on the pleadings and their answer to the motion for the appointment of a special master, submit that this case is now in an appropriate posture for resolution. The issues raised by the motion of the plaintiff states are purely legal and thus appropriately should be decided on the basis of the pleadings. *See, e.g., Douglas v. Seacoast Products, Inc.,* 431 U.S. 265, 271-72 (1977); *Philadelphia v. New Jersey,* 430 U.S. 141 (1977); *United States v. Louisiana,* 363 U.S. 1 (1960) (all indicating that the determination of a supremacy clause issue presents a purely legal question); *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977) (finding a commerce clause violation without a record). *See also* Brief in Support of Motion for Judgment on the Pleadings, at 39-41.

CONCLUSION

For all of the above reasons, and to prevent mammoth economic loss to the plaintiff states and their economies, the defendant's motion to dismiss should be denied, and this Court, without appointing a special

[9] Louisiana's motive for seeking delay, it is submitted, is more pecuniary than philosophical. *See* footnote 8, *supra.*

master, should act expeditiously on the motion of the plaintiff states for judgment on the pleadings.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Number 83, Original

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STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

VERSUS

STATE OF LOUISIANA,

Defendant

ON MOTION FOR JUDGMENT ON THE PLEADINGS

BRIEF OF STATE OF LOUISIANA IN RESPONSE TO BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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BRIEF OF STATE OF LOUISIANA IN RESPONSE TO BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

I. INTRODUCTION

At the outset, the State of Louisiana must register dissent to the basic assumptions that mark the vigorous efforts being made to secure a judgment of constitutional proportions on the barebone pleadings in this original action. Those assumptions, each of which has been found unworkable by this Court, are:

(1) The assumption that this Court sits, in exercise of its original jurisdiction over controversies among two or more States, to invalidate a new and untested statute of a sovereign State without according that State a full opportunity to develop the necessary factual and statutory predicates. But as this court has often observed, in original actions the Court, "passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts." *United States v. Texas*, 339 U.S. 707, 715 (1950).

(2) The assumption that this Court sits in exercise of its great function as the final arbiter of the constitutionality of state statutes, as the initial tribunal to determine the meaning and scope of a new state statute and to determine the precise facts to which the statute has been applied. But this Court has steadfastly refused to accept such an assignment. It has consistently stayed both its original and appellate powers of constitutional adjudication where an unconstrued state statute is susceptible of a construction and application by the state judiciary "which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 177 (1959). See also *Bellotti v. Baird*, 428 U.S. 132, 146-147 (1976); *Elkins v. Moreno*, 435 U.S. 647, 661 (1978).

(3) The assumption that this Court sits to resolve the validity of state statutes upon the complaint and arguments of those who are not real parties in interest and who have not been directly injured or affected by the application of that statute. But it is too late in the day to mount challenges to the settled doctrine that constitutional adjudication is legitimate only when necessitated by a "real, earnest and vital controversy between individuals," *Chicago & G.T.R. Co. v. Wellman*, 143 U.S. 339, 345 (1892), upon complaint of one "whose rights are directly affected," *Hendrick v. Maryland*, 235 U.S. 610, 621 (1915), by application of the statute.

(4) The assumption that the Louisiana state courts,

> wherein pends a tax refund suit by the real parties in interest raising the identical constitutional issues put to this Court, cannot be trusted to provide an expeditious and adequate remedy and cannot be trusted to respect and apply relevant federal constitutional doctrines in that suit. Suffice it to say that this Court does not indulge in any such notion that state courts are unable or unwilling to give effect to the supremacy of the Federal Constitution.

These various misassumptions find their ultimate expression and reincarnation in this case in the zeal with which the pending motion for judgment on the pleadings is being pursued. It is a motion for a judgment of constitutional proportions filed by eight States that have alleged and shown no direct interest or injury resulting from an application to those States of the Louisiana First Use Tax statute. It is a motion that protests the constitutional rights of certain private taxpaying entities that in no way can be considered agents or representatives of any of the eight States. It is a motion filed by States that have alleged no constitutional right of their own, no cause of action, with respect to their concern as consumers with increases in the costs and taxes that the manufacturer or transporter of a commodity has succeeded in passing on to all consumers. In short, the motion epitomizes the incredible assumption of the complaint that one State, posing as the consumer of products that have somehow been taxed by another State, can act as the National Enforcer of the constitutional obligations of the taxing State.

The instant motion, moreover, is one that seeks to compel this Court to perform the initial duty of the Louisiana Supreme Court, i.e., to make an initial authoritative construction of this new statute and to determine the precise circumstances to which this statute was intended to apply, and was in fact applied. Those who seek to fasten that function upon this Court apparently hope that the pending tax refund suit in the Louisiana courts, wherein the statute will be authoritatively construed

and applied in the light of the taxpayers' constitutional claims, will somehow be forgotten or ignored by this Court.

Basically, the motion for judgment on the pleadings is being pursued as though the Louisiana First Use Tax statute could be constitutionally assessed in a vacuum, without regard to its various possible interpretations or the various circumstances to which it might be applied. The motion assumes that there are only constitutional or legal issues to be decided and that those issues can be derived from reading the plain words of the Louisiana statute. But merely reading the words of the statute reveals the speciousness of that assumption. Such a reading, for example, calls forth a variety of unresolved problems of statutory interpretation and application:

> (1) What construction is to be given each of the eight different "uses" mentioned in LSA R.S. 47:1302(8), "uses" which can lead to the imposition of the tax in question?
>
> (2) Which of the eight "uses" has led to the imposition of the tax in any given instance? Which "use" or "uses" have the Louisiana tax authorities deemed controlling?
>
> (3) Do all eight "uses," once they have been defined and related in terms of the interstate flow of gas, necessarily evoke identical federal constitutional problems? Is it possible that the Louisiana Supreme Court might so define some of these "uses," or so limit their applicability, as to change if not eliminate some or all of the constitutional questions now being asked?
>
> (4) What nexus with Louisiana do these various "uses" have? How fairly is this use tax related to various services performed by Louisiana for the taxpayers? How are the problems of apportionment and discrimination dealt with in this statute? Is apportionment necessary or is discrimination even possible under a proper interpretation of this statute? What are the problems and premises

that the Louisiana legislature had in mind when it imposed this tax on "uses?"

(5) What is the purpose and the construction to be given to the severance tax credit provisions of LSA R.S. 47:647, and the provisions of LSA R.S. 47:1303C relating to the enforceability of certain contracts respecting reimbursement or refund of the first use tax paid by owners of gas? How do these provisions fit into the overall scheme of levying the first use tax on the prescribed "uses?"

Given such unanswered factual and statutory problems, it is impossible to accept the movants' assertion (Brief in Support of Motion for Judgment on the Pleadings, p. 39) that "it is obvious that all of the facts material to the determination of this controversy in its present posture have been admitted by Louisiana in its answer, already found authoritatively by this Court, or are otherwise subject to its judicial notice." The answers to these various problems, which are the predicates to the delineation and resolution of precise constitutional questions, have not been and cannot be "found authoritatively by this Court." And the answers certainly cannot be found by resort to the judicial notice syndrome.

What is most disturbing about the movants' assertion, however, is the claim that Louisiana has admitted in its answer most if not all the facts material to a constitutional determination. Just what facts Louisiana has admitted are not detailed or described, though it would appear critical to the success of the motion that they be brought to the attention of this Court. It is hornbook law that all the allegations in the pleadings of the movant must be deemed false, while all the facts and reasonable inferences in the opposing party's pleadings are assumed to be true. *National Metropolitan Bank v. United States*, 323 U.S. 454, 456-457 (1945). In other words, the legal inadequacy of the presumably true denials and assertions in the opposing party's pleadings is the measure of whether the motion for judgment on the pleadings should be granted.

But in this case, the eight States have avoided a description or analysis of Louisiana's answer by resort to the pejorative. The careful denials in that answer of the material facts asserted in the complaint and the numerous affirmative allegations of fact in that answer are brushed aside as "pro forma denials or contradictions" and as "mock denials, contradictions, or assertions." (Brief, p. 39). Nothing is said about the presumed truth of those denials and assertions, nor whether they relate to material facts.

This, then, becomes a perfect illustration of why federal courts have generally been reluctant to grant motions for judgment on the pleadings. Predicating any kind of adjudication on the moving party's heated assessment of his opponent's initial pleading is not consistent with the adjudicative functions of federal courts. Such a "hasty or imprudent use of this summary procedure by the courts violates the policy in favor of ensuring to each litigant a full and fair hearing on the merits of his claim or defense." 7 Wright and Miller, *Federal Practice and Procedure*, 690 (1969).

It is precisely because such a motion operates to deny Louisiana's right to a full and fair hearing on the merits of its defense to its use tax statute that Louisiana continues to insist upon such a hearing, either before a Special Master appointed by this Court or preferably in the fact-finding forum in the state courts of Louisiana. But wherever held, such a hearing is essential if the broad constitutional questions here posed are ever to be refined and confined to adjudicatory size.

It may well be, that the modern notions of notice pleading have increasingly rendered judgments on the pleadings a slim and inadequate reed upon which to rest the heavy burden of constitutional assessment of a controversial, complex and unconstrued state statute. Perhaps some of Louisiana's denials were "pro forma," though none were intended to be "mock." But

often that is all an answer is supposed to be under current pleadings practice. And to hold a defendant to have admitted all facts to which he entered a "pro forma" denial serves no adjudicatory policy. It can only unfairly deprive the defendant of his factual day in court.

Still another evil emerges from this attempt to secure a summary constitutional adjudication. By rejecting as "pro forma" and "mock" all the opposing party's denials and assertions, the movant is free to engage in his own factual and statutory analyses, adding whatever additional facts and assertions may suit his purpose. That is precisely what has happened in this case. Both the plaintiff States and the *amici* have totally ignored all of Louisiana's denials and assertions, and have constructed their own factual and statutory structures. They have created their own interpretations and versions of the Louisiana First Use Tax statute under the rubric of reading the plain words thereof. And they have assumed, often incorrectly, the nature of the constitutional facts and circumstances upon which Louisiana has imposed this tax.

These are some of the more obvious difficulties and problems created by any attempt to construct, out of the initial pleadings in an original action before this Court, the facts and the issues appropriate to assessing the constitutional validity of a new and complex state tax statute. Those difficulties and problems are ultimately ascribable to the fact that this type of case, which needs the helping hand of a state court delineation of the facts and a state court interpretation of the state statute, is one that should come here on appeal or certiorari from the highest state court. This case really belongs on the appellate docket, not the original docket. And if the case were to come here on the appellate docket, it would come with all the facts fully developed, the issues refined, and an authoritative construction of the state statute already provided.

As the Court noted in *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 (1971), "This Court is, moreover, structured to perform as an appellate tribunal, ill-equipped for the task of factfinding and so forced, in original cases, awkwardly to play the role of factfinder without actually presiding over the introduction of evidence." Add to that consideration the fact that the role of this Court in the federal-state system of government does not permit it to sit in judgment in the first instance on the meaning and validity of a statute of one of the sovereign States. In combination, these factors render inappropriate and unwise any further pursuit of this attempt to convert this Court into a surrogate fact finder and state statute interpreter.

That conclusion is in no way impaired by the unattended assertions of the *amici* (Brief, p. 54) that there is "a compelling need for a prompt decision on the merits in this case . . . [since] millions of natural gas consumers face the prolonged imposition of very substantial additional costs, with little hope of recompense for the economic burdens imposed by such costs." The plaintiff States have added additional and undocumented assertions that the Louisiana First Use Tax has imposed a "mammoth economic burden" directly on those States, and has harmed "the economic prosperity of entire regions of the country." (Brief in Opposition to Motion to Dismiss, pp. 4, 5.)

Such self-serving prophesies of economic doom cannot do service as reasons why this Court should abandon its appointed role as the appellate arbiter of the constitutional validity of state statutes. Assumption of the role of initial fact finder and interpreter of state statutes on the ground of economic expediency is unjustified by any constitutional or jurisdictional principle. If the complaining parties in interest want to expedite resolution of any legitimate constitutional claims, they need

only reactivate and expedite the pending tax refund suit in the Louisiana courts.[1]

Under the circumstances, all that the State of Louisiana can do in this brief is to point to the *amici* brief as an example of how treacherous it is to attempt to initiate in this Court the groundwork for assessing the constitutional validity of a state statute. The brief will attempt to show how constructing that groundwork solely from the initial pleadings breeds a host of questionable and unreliable facts and analyses. Motions and briefs only add further confusion.

This brief will then conclude with an attempt to show how the constitutional arguments of the *amici*, based as they are on a total absence of any factual record, become exercises in futility. Many of those arguments become illusory and imprecise without any authoritative construction of the Louisiana statute to draw from. In response to such arguments, Louisiana can do little more than suggest what its answers might be were it given the opportunity to develop the facts and were the Louisiana Supreme Court allowed to proceed to render a definitive interpretation of the First Use Tax statute.

---

1. For the convenience of this Court, a copy of the relevant portions of the complaint in that tax refund suit is attached as an appendix to this brief. The suit, which was filed on June 22, 1979, is pending in the Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana, under docket Number 225,533, Section "D", and is captioned "Southern Natural Gas Company, Transcontinental Gas Pipe Line Corporation, Columbia Gas Transmission Corporation, Florida Gas Transmission Company, Michigan Wisconsin Pipe Line Company, Natural Gas Pipeline Company of America, Tennessee Gas Pipeline Company (a division of Tenneco, Inc.), Texas Eastern Transmission Corporation, Texas Gas Transmission Corporation, Trunkline Gas Company, United Gas Pipe Line Company, Sea Robin Pipeline Company, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, and Mississippi River Transmission Corporation v. Shirley McNamara, Secretary, Louisiana Department of Revenue and Taxation, The Louisiana Department of Revenue and Taxation, and the State of Louisiana."

II. THE ABSENCE OF A FACTUAL RECORD

This Court has long followed the "salutary principle that the essential facts should be determined before passing upon grave constitutional question." *Polk v. Glover*, 305 U.S. 5, 10 (1938).

But that principle is difficult to follow in an original proceeding before this Court, where there has been no opportunity to develop a factual record in some lower court. And the principle is especially difficult to follow where the plaintiffs ask this Court to find the "essential facts" from the initial pleadings and from what the plaintiffs conceive to be factual matters reflected in statutory language or in items supposedly entitled to judicial notice. On numerous occasions this Court has found that a factual record structured solely or primarily from untested pleadings is too fragile, too uncertain, and too unreliable a base upon which to proceed to resolve grave constitutional issues. See *Borden's Co. v. Baldwin*, 293 U.S. 194, 211-213 (1934); *Hammond v. Schappi Bus Line*, 275 U.S. 164, 168-172 (1927).

These difficulties become even further compounded when the constitutional issues at stake require the Court to examine the factual and economic impact of a challenged statute. Thus in this proceeding the Court is being asked to declare the Louisiana First Use Tax invalid under the Commerce Clause because the economic impact shows that it is discriminatory in nature. Such factual and economic complexities, as the Court noted in *Borden's* case, 293 U.S. at 210-211, make it "the more imperative that the Court in discharging its duty . . . shall not proceed upon false [factual] assumptions."

The likelihood that "false assumptions" and incorrect analyses may ensue from reliance upon a party's untested pleadings and briefs is well illustrated by an examination of the brief filed herein by the *amici*.

EXAMPLES OF QUESTIONABLE AND UNRELIABLE FACTS AND ANALYSES WITHIN THE *AMICI* BRIEF
(All references are to pages of the *amici* brief)

AMICI ASSERTIONS	*ACTUAL FACTS TO BE SHOWN BY FACT-FINDING PROCEDURES*
1. "The Act . . . imposes a tax on the first 'use' of natural gas in Louisiana originating outside of that state that moves in interstate commerce . . ." (Pp. 4, 5, 44 and 45)	1. The gas subjected to the tax is not moving in interstate commerce at the time the taxable incidences occur.
2. "The principal impact of the tax is on gas . . . ." (Pp. 4 and 8)	2. The tax is not imposed "on gas" but upon local activities or uses allowed or permitted by the owners thereof to be performed in Louisiana.
3. "[T]he tax is on gas . . . imported from abroad [foreign countries] . . . ." (Pp. 4, 8, 9, 16 and 25)	3. Natural gas imported from foreign countries is excluded from the imposition of the First Use Tax.
4. "[F]irst 'use' is defined so broadly as to include even the measurement of gas flowing in interstate commerce . . . ." (P. 4)	4. Section 1302(8) does not define "measurement of gas" as a use subject to the tax.
5. "If the federal government's lessees are compelled to pay the First Use Tax, the revenues received by the United States from these leases could be significantly affected . . . ." (Pp. 4 and 5)	5. By definition only owners of gas subject to the uses are liable for the First Use Tax and the federal government lessees are not owners of approximately 80% of the gas and not subject to the tax by the statute, but, may be liable by virtue of contracts placing tax liability on themselves. Where lessees are

owners the tax is susceptible to being passed on under the NGPA to ultimate consumers upon the approval of FERC.

6. "[T]he Commission has been forced to promulgate regulations . . . ." (P. 5)

6. The regulations in question were an exercise of the discretionary authority of the Commission pursuant to an application for same by potential taxpayers — natural gas companies — under the ratemaking jurisdiction of the Commission.

7. "[T]he Louisiana tax has imposed substantial administrative and regulatory burdens upon the Commission." (P. 6)

7. The First Use Tax imposes nothing upon the Commission. Its administration and regulatory activities are imposed by federal statutes.

8. "The First Use Tax imposes a volume tax of seven cents per thousand cubic feet . . . upon the first 'use' within Louisiana of any natural gas . . . ." (P. 6)

8. The tax is imposed upon the use of the natural gas within Louisiana and the rate of measurement is not the tax.

9. "[W]hile Louisiana has prohibited the purchasers of gas subject to the tax from shifting it to the producer, it does not prohibit purchasers of gas subject to its severance tax from shifting all or part of the tax to the producer . . . ." (Pp. 18, 36, 41, 49 and 52)

9. The Louisiana First Use Tax and the Louisiana severance tax places the tax liability upon the owner of the natural resource subject to the tax at the time of the occurrence of the taxable incident. The producer of natural resources in Louisiana is normally the owner at the time the natural resource is severed, subject to royalty interest owners. The First Use Tax statute prohibits the

owner of natural gas [not the purchaser of natural gas] subject to the tax from seeking reimbursement of its liability from any party other than a purchaser of the gas.

10. "While the Louisiana tax is characterized as 'upon the privilege of performance by the owner, of the enumerated actions comprising first use within Louisiana' . . . the provisions of the Act demonstrate that the tax falls on the transportation of the natural gas within Louisiana, not the privilege of use . . . ." (Pp. 18, 28, 44, 45 and 48)

10. Section 1302(8) defines use, among other things, as "processing for the extraction of liquefiable component products or waste materials; use in manufacturing; treatment;" which activities are not mere transportation but are local activities performed by owners of the natural gas.

11. "The Louisiana First Use Tax requires 'out-of-state consumers to bear the entire burden of the levy.' " (Pp. 19, 41 and 50; see also pp. 9 and 51)

11. Only the Commission may authorize a cost of service to be passed on to consumers (Section 4 and 5 of the Natural Gas Act and Section 110 (a)(2) of the Natural Gas Policy Act). The First Use Tax does not require any person other than the owner of the gas subject to the tax to bear the burden of the entire tax. Consumers in Louisiana are also required to pay their portion of the tax, especially the ultimate consumers. The provisions of LSA-R.S. 47:11 (Act 599 of 1978) granting certain tax credits on other state taxes to certain Louisiana consumers are only applicable if the tax liability equals or exceeds $250.00

annually to a maximum credit for all such consumers of two million dollars. The tax credit does not relieve the tax payer of tax liability.

12. "So long as the validity of the Louisiana tax remains unresolved, millions of natural gas consumers face the prolonged imposition of very substantial additional costs, ..." (P. 54)

12. The average residential consumers' "substantial additional costs" will be at the most approximately .07¢ per month or .84¢ per year.

The foregoing is necessarily incomplete. But there are evident enough conflicts with respect to crucial facts to make it impossible either to divine or to argue the precise constitutional issues at stake. No assurance can be given this Court that the facts essential to performance of its task of constitutional adjudication can be correctly divined from a mere reading of the pleadings, the statutes or whatever else is subject to judicial notice.

Indeed, the State of Louisiana suggests that its denials of the factual allegations in the complaint, combined with its own assertions of fact, and the facts that it is prepared to prove upon an evidentiary hearing, paint a totally different picture of the constitutional issues respecting the Louisiana First Use Tax. Louisiana's version of the facts would create quite a different approach by this Court both in the formulation and the resolution of the Commerce Clause and Supremacy Clause problems that have been raised in the motion for judgment on the pleadings.

This case is simply not ripe for final constitutional adjudication. The rush to judgment on the pleadings can only result in a hasty use of advisory opinions on sets of facts having no firmer base than disputed allegations in the complaint and the questionable analyses made by the supporting brief writers.

Given such an inadequate state of the record, the State of Louisiana still feels obliged to attempt to provide this Court with some idea of the constitutional arguments Louisiana could make were the issues ever to be defined or refined in light of a properly developed factual record.

III. THE ALLEGED VIOLATIONS OF THE COMMERCE CLAUSE

The *amici* brief utilizes several threads of Commerce Clause analysis to promote its argument that the Louisiana First Use Tax statute is facially invalid under that Clause.

A. *The "flat prohibition" argument*

The first stand taken by *amici* centers on the traditional notion that the Commerce Clause "flatly prohibits state taxation of goods that are merely in transit through the state when the tax is assessed" (Brief, p. 44). Citation is made to *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 290, n. 11 (1976). This point is supplemented by an earlier claim (Brief, p. 28) that the interstate flow of natural gas is steady and continuous from the well-head to the consumer burner tips, not being interruptible by any processing that may occur along the interstate way. Authority for that point apparently rests upon dicta appearing in the *Michigan-Wisconsin* opinion, 347 U.S. at 163, and in a lower court opinion in *Deep South Oil Co. v. F.P.C.*, 247 F.2d 882, 888 (5th Cir. 1957).[2]

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2. Cf. The dissent of Circuit Judge John R. Brown in the *Deep South* case, 247 F.2d at 893, protesting that this notion of the ever-constant movement of natural gas from well-head to burner "is to mix Boyles and Phillips law to come up with the startling legal-statutory interpretation law that because gas, once released is in a constant state of movement, that *movement*, from the very moment it first started, is characterized (intra or interstate) by its final destination."
The majority dictum in *Deep South* that gas moves constantly from well-head to burner and is not interrupted by processing has never been cited by any other federal court.

The *amici* then proceed to press their own version of the facts and of the language and impact of the Louisiana statute in order to force the statute squarely within the "flat prohibition" area roped off by this Commerce Clause analysis. By dint of their own *ipse dixit*, the *amici* read the Louisiana statute as necessarily imposing the tax "upon gas that is in transit through Louisiana in interstate commerce" (Brief, p. 44). And they further read the clear language of the statute imposing the tax on the various processing "uses" within Louisiana as a total subterfuge, incapable of overcoming various judicial comments made in other contexts that appear to say that the continuous flow of interstate gas is not interrupted by processing along the way.[3] Therefore, say the *amici*, no amount of factual development or state court interpretation and characterization of the taxable incident can alter the hard fact that the "real nature" of this tax is a constitutionally forbidden one. It is a tax on gas while in its uninterruptible interstate stream.

As a technique for achieving a Commerce Clause condemnation of a state tax statute, this seeming *tour de force* of the *amici* leaves several things to be desired. Factually and legally, it is not at all clear that for purposes of state taxation the interstate stream of natural gas must be deemed uninterruptible from well-head to burner, the flowing gas to be deemed

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3. The remark in the *Michigan-Wisconsin* opinion (347 U.S. at 163) that the "entire movement of the gas, from producing wells through [the processing] plant and into the . . . pipeline to consumers outside Texas, is a steady and continuous flow" was merely a description of the physical continuity of the flow of gas from well-head to consumer. It was not a description of the portion of that flow that is describable as interstate commerce and thus immune from state taxation. The actual holding in *Michigan-Wisconsin* was that the state tax there involved was impermissible levied upon an incident (a "taking" of the gas from the processing plant) that occurred "beyond the step where production and processing have ceased and transmission in interstate commerce has begun." 347 U.S. at 167. In other words, the Commerce Clause tax concern was only with the interstate transmission of gas from the processing plant.

impervious to any local event outside the stream that processes, alters, or changes the very nature or content of the flowing gas. Indeed, this Court's decisions in *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 108-111 (1975), and in *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 84-85 (1948), clearly indicate there can be taxable local activities "apart from the flow of [interstate gas] commerce" that serve to maintain, keep in repair, and otherwise protect the facilities that make possible the interstate flow. A local processing plant that extracts by-products from the well-head gas and thereby changes the chemical content of the gas so that it becomes usable by consumers would appear to be even more of a local activity "apart from the flow of commerce" than those referred to in *Colonial Pipeline* and *Memphis Natural Gas*.

Moreover, the *Michigan-Wisconsin* case, so heavily relied upon by *amici*, suggests an even more intriguing factual definition of that kind of interstate flow of gas that is subject to the "flat prohibition" of state taxes where it appears from the fact, as it did in *Michigan-Wisconsin*, that a substantial processing event occurs during the physical flow of gas from the well-head to consumer, then the interstate journey with which the Commerce Clause may be said to commence at the point where both "production and processing have ceased and transmission in interstate commerce has begun." 347 U.S. at 167. Then a state tax is "flatly prohibited" only if its incidence occurs after the gas has been processed and the interstate journey has thereupon commenced.[4] See also *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 675 (1954), describing

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4. Of course, if the processing involves nothing more than removing dirt and foreign particles from so-called "dry gas," there may not be a sufficiently local incident to justify describing the interstate movement, for Commerce Clause tax purposes, as commencing only as the gas leaves the processing facilities. See *Interstate Natural Gas Co. v. F.P.C.*, 331 U.S. 682, 685, n. 7 (1947).

the interstate flow of gas as that which "flows from the processing plant through an outlet pipe . . . [and] then continues its flow through the interstate pipeline system until delivered in other states."

The *amici* have thus confusedly equated the physical, continuous and uninterrupted movement of gas from well-head to consumer with those portions of such movement that can fairly and factually be described as purely interstate in nature for purposes of immunizing the movement from state taxation. Then too, the *amici* have shown no awareness that the terminal points of an interstate movement of gas may be described quite differently for purposes of assessing the scope of federal regulatory power than for purposes of defining the scope of state power to tax or regulate local incidents apart from, though related to, the purely interstate flow. See *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 369 (1965)), defining the interstate movement of gas for Natural Gas Act regulatory purposes as extending "from well-head to ultimate consumer."

Thus, while gas is often said to flow uninterruptedly to the burners of the consumers, for state tax purposes the interstate flow is said to cease once it passes into the local distribution systems in the terminal state prior to transmittal to the consumers' burners. *East Ohio Gas Co. v. Tax Commission*, 283 U.S. 465 (1931). And what seems to emerge from the *Michigan-Wisconsin* line of analysis is that, for state tax purposes, the interstate movement of gas commences at the "tailgate" of the processing plant, provided the processing significantly alters the chemical content of the gas. Put differently for state tax purposes the only gas that is totally immune from tax is that which has been refined for use by consumers, and then only when such gas is en route interstate from the processing facility to the local distribution facility.

It follows that judgment on the pleadings respecting the "flat prohibition" concept of the Commerce Clause cannot at this point be rendered against the State of Louisiana. The true contours of that concept are such that a full development of the facts and a definitive interpretation of the Louisiana Tax statute as applied to those facts must be had before a court can say whether the First Use Tax is consistent or inconsistent with the Commerce Clause. What is the nature of the flow of natural gas from the OCS well-heads to the consumers? What is the nature and extent of the processing that takes place in Louisiana? Does it so alter the chemical content of the offshore gas that the interstate stream of gas available for consumption does not commence until the processed gas leaves the "tailgate" of the processing plant in Louisiana? Is this processing "apart from the flow of commerce," *Colonial Pipeline Co. v. Traigle, supra*, or does the processing occur before the interstate journey has commenced, *Michigan-Wisconsin Pipe Line Co. v. Calvert, supra?* And precisely what part or "use" of the processing facilities constitutes the taxable incident within the meaning of the Louisiana First Use Tax statute?

Louisiana is entitled to an opportunity to prove what the true facts are with respect to the nature of the gas as it flows into and then out of Louisiana. It is entitled to a chance to prove how the incidents of processing fit into that flow, whether they interrupt or precede or are apart from the interstate flow. And the situation is such that only a definitive interpretation of the statute by the Louisiana Supreme Court can make clear which of the various "uses" related to the processing constitutes the critical tax incidence.

The allegations in Paragraph XXXV of the Complaint, from which the States and the *amici* seek to impose a summary judgment of Commerce Clause invalidity, are simply too imprecise, too factually questionable, and too unclear as to the impact of the First Use Tax to permit this Court to conclude that the

Louisiana statute is facially and clearly inconsistent with the Commerce Clause.

B. *The apportionment and discrimination arguments*

Alternatively, the *amici* suggest (Brief, p. 46) that the First Use Tax may be instantly declared invalid under the Commerce Clause "because it is not fairly apportioned and because it discriminates against interstate commerce."

Significantly, the apportionment and discrimination concepts put forth in the motion for judgment on the pleadings and supported by the *amici* are but two parts of the four-pronged Commerce Clause test articulated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), and *Washington Rev. Dept. v. Stevedoring Assn.*, 425 U.S. 734, 750 (1978). See also *Japan Line, Ltd. v. County of Los Angeles*, 60 L.Ed. 2d 336, 345 (1979). The theory of this Commerce Clause analysis, which substantially undermines the first argument of *amici* relative to the absolute bar on taxing interstate commerce, is that those who engage in interstate commerce are not relieved by the Clause from their just share of state tax burdens.

Accordingly, a state tax can survive a Commerce Clause challenge if, in practical terms, (1) the tax is applied to an activity with a substantial nexus with the taxing state, (2) the tax if fairly apportioned, (3) the tax does not discriminate against interstate commerce, and (4) the tax is fairly related to the services provided by the State. In short, a tax on interstate commerce is not "per se unconstitutional." *Complete Auto Transit*, 430 U.S. at 289. Rather, the validity of such a tax depends upon proof of compliance with the four-pronged practical test.

One of the major premises of this four-pronged test is that compliance therewith depends upon an assessment of the economic realities as to the impact of the challenged tax. For the most part, the burden of proving the factual realities rests

upon those who would challenge the tax, for a state tax on commerce is presumed permissible unless and until there has been "developed . . . [a] factual basis on which to declare the [state] tax unconstitutional as applied." *Washington Rev. Dept. v. Stevedoring Assn.*, 435 U.S. at 751.

Each prong of this test, in other words, depends upon factual proof of the relevant economic realities. It is no longer possible, since the overruling of the *Spector* (*Spector Motor Service v. McLaughlin*, 323 U.S. 101 (1944)) decision in *Complete Auto Transit* (see 430 U.S. at 288-289), to assess the validity of a state tax solely in terms of the language used or not used by the legislative draftsmen. Whether a tax applies to an activity with a substantial nexus with the State, or whether the tax is to be considered properly apportioned and non-discriminatory, is to be divined from something more realistic than statutory phraseology, which may be largely talismanic if not poorly phrased. As was said in *Complete Auto Transit*, 430 U.S. at 288, there is "no economic consequence that follows necessarily from the use of the particular words [in the state tax statute], and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect."

What is so wrong about the approach of the States and of the *amici* to these apportionment and discrimination factors is the assumption that these factors can be determined solely by reading the words and the sections of the Louisiana First Use Tax statute. And the theory of the motion for judgment on the pleadings is that no factual development is necessary. Thus the motion, as demonstrated in the supporting briefs, is designed to choke off the factual development that this Court has declared is essential to the application of the four-pronged economic impact test. The initial pleadings, supplemented by a questionable reading of the words of the tax statute, are a totally inadequate substitute for the development of a factual basis for assessing the validity of the tax in light of economic realities.

Moreover, the motion for judgment as to the invalidity of the Louisiana tax under the Commerce Clause makes a further mistake in assuming that judgment can be rendered by considering in isolation only two of the four economic factors. Non-compliance with any one of the four requirements will invalidate a state tax. But the four factors must initially be developed and considered together. What may be deemed discriminatory or non-apportioned necessarily depends upon proof of an activity that has a substantial nexus with the State. It is a tax first found to be based upon that type of activity that is to be tested in terms of apportionment and discrimination.[5]

By ignoring the proof required with respect to the nexus of the taxed activity, the States and the *amici* have felt free to develop their own questionable notion of what is the taxable incident. Repeatedly they assert and assume, from nothing more substantial than their own reading of the statute, that the Louisiana First Use Tax is levied not upon any use or activity within Louisiana but upon the whole of the gas that is in interstate transit (Brief, p. 44). From that questionable and faulty premise, it becomes an easy exercise to assert, with the aid of a few references to other statutory language, that the effect of a tax on all the gas in interstate transit is discriminatory and non-apportioned.

But if it is factually demonstrable that the Louisiana First Use Tax is truly laid upon a local and one-time processing incident, occurring prior to the start of the interstate flow of processed gas useable by consumers, the apportionment problem would virtually answer itself. Then it could be said that "the

5. "The degree of 'connection,' 'contract,' or 'nexus' between the taxing state and the interstate commerce taxes is also the fundamental measure of whether or not a state tax violates the commerce and due process clauses. Therefore, to the extent that a state can point to a substantial connection with a particular aspect of interstate commerce, it can also demonstrate that its program is consistent with the commerce and due process clauses." L. Tribe, *American Constitutional Law* 346 (1978).

tax is not one which in form or substance can be repeated by other states" and that "[a]ll the events upon which the tax is conditioned . . . occur in [Louisiana] and not elsewhere." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 260 (1938). Apportionment would in that event be impossible and thus unnecessary even under the *Complete Auto Transit* methodology.

It ill serves the cause of constitutional adjudication before this Court to ignore the factual development that the Court has declared to be essential to the assessment of a tax levied by a sovereign State. The effect is to strip the State of the right to defend the validity of its statute on the terms specified in this Court's opinions.

Louisiana's tax statute cannot be declared invalid, on a motion for judgment on the pleadings under the Commerce Clause, where there has been no factual record established to show that the tax is either discriminatory or non-apportioned.

IV. THE ALLEGED VIOLATIONS OF THE SUPREMACY CLAUSE

The plaintiff States urge in their motion for judgment on the pleadings that the First Use Tax is violative of the Supremacy Clause under two premises. First, interference with the Natural Gas Act; and second, preemption by the Outer Continental Shelf Lands Act. The supporting brief of the *amici* (the United States and the Federal Energy Regulatory Commission) urges judgment on only the first of these premises: "The Louisiana First Use Tax conflicts with federal regulation of the sale and transportation of natural gas in interstate commerce [pursuant to the Natural Gas Act] and is therefore invalid under the Supremacy Clause of the Constitution." (Brief, p. 16)

At the start it should be noted that *amici* devote much of the content of their brief (pp. 4, 8, 9, 16, 19, 21, 22, 25, 26,

29, 30, 47, 49 and 52) to arguments concerning the effect of the First Use Tax on gas imported from foreign countries. In an effort to formulate the true issues for consideration by this Court, Louisiana has shown in its answer to the original complaint (paragraph LV, p. 19) what it conceives to be the proper construction and intent of the First Use Tax as respects gas imported from a foreign country, i.e., it is not subject to the tax. All gas characterized as an import from a foreign country is *subject to* the levy of an import tax or tariff by the United States by virtue of Article I, Section 10, Clause 2. The Louisiana Legislature has therefore made the First Use Tax applicable, in part, only to gas "which is *not subject to* the levy of any import tax or tariff by the United States as an import from a foreign country." LSA-R.S. 47:1303 A. Merely because gas imported from a foreign country is not presently the *subject of* a tariff or import tax is irrelevant, since the character of the gas as an import makes it subject to the taxing authority of the United States, i.e., *subject to* the levy of an import tax or tariff. It is therefore beyond the reach of the First Use Tax.

A. *Federal Regulation*

The motion for judgment on the pleadings is inappropriate for it requires the Court to resolve disputed factual matters and determine which of the several uses, defined as incidents of local taxation by Louisiana's First Use Tax, are at issue. Such factual determination can best be made by the Louisiana Courts, traditionally the first forum with the right of initial statutory interpretation of a state statute. Any such factual determination and statutory interpretation of Louisiana's First Use Tax will define which of the several uses, if any, are subject to the imposition of the tax. This Court will then have for consideration the refined issue of whether the tax as applied to the factually identified use or uses is violative of the Supremacy Clause. The absence of definitive facts before this Court negates the summary disposition of substantial and

grave constitutional issues.

This portion of the brief will attempt to respond to the constitutional arguments posited by *amici* notwithstanding the absence of salient facts.

The plaintiff States and *amici* attempt to persuade the Court that the First Use Tax is in reality a tax either on the transmission of natural gas in interstate commerce or on the natural gas itself. From that questionable premise, the argument is made that the tax constitutes a regulation of the transportation and sale of natural gas in interstate commerce, and also constitutes a tax on the severance or production of natural resources on the Outer Continental Shelf. All of this is said to interfere with the ratemaking jurisdiction of the Commission and thus to be prohibited, directly or indirectly, by the Natural Gas Act, the Natural Gas Policy Act and/or the Outer Continental Shelf Lands Act.

1. *Section 1303 C*

Amici argue that Section 1303 C (LSA-R.S. 47:1303 C); first, "impinges upon the Commission's ratemaking authority under Sections 4 and 5 of the Natural Gas Act (15 U.S.C. 717c, 717d)" (Brief, p. 32); second, "interferes with the Commission's authority to control the terms on which natural gas is transported in interstate commerce through the issuance of certificates of public convenience and necessity under Section 7 of the Natural Gas Act (15 U.S.C. 717f)" (Brief, p. 37); and third, "interferes with the regulation prescribed by the Natural Gas Policy Act in two distinct ways" (Brief, p. 39); (a) as violative of Section 110 (a) (2) (Brief, p. 40) and (b) as violative of Section 121 (b) (Brief, p. 41).

Section 1303 C of Title 47 of the Louisiana Revised Statutes of 1950, as amended by Act 293 of 1978, provides:

> "In furtherance of the public policy and purpose set forth in Section 1301 of this part, and particularly

Subsection C of said Section, this tax shall be deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas. Any agreement or contract by which an owner of natural gas at the time a taxable use first occurs claims a right to reimbursement or refund of such taxes from any other party in interest, other than a purchase of such natural gas, is hereby declared to be against public policy and unenforceable to that extent. Notwithstanding any such agreement or contract, such an owner shall not have an enforceable right to any reimbursement or refund on the basis that this tax constitutes a cost incurred by such owner by virtue of the separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, or that this tax constitutes any other grounds for reimbursement or refund under such agreement or contract, unless there has been a final and unappealable judicial determination that such owner is entitled to such reimbursement or refund, notwithstanding the public policy and purpose of this part and the foregoing provisions of this Subsection C. In any legal action pursuant to this Subsection, the state shall be an indispensable party in interest."

The Commission has exclusive jurisdiction under Sections 4 and 5 of the Natural Gas Act (15 U.S.C. § 717c and 717d) for ratemaking and under Section 7 of the Natural Gas Act (15 U.S.C. 717f) for the issuance of certificates of public convenience and necessity, pertaining to natural gas dedicated or committed to interstate commerce and natural gas transported for sale in interstate commerce. Natural gas produced on the Outer Continental Shelf is such gas. Section 2 (18) (A) (i) of the Natural Gas Policy Act (15 U.S.C. 3301). However, dedicated or committed to interstate commerce is not synonymous with interstate commerce under the Commerce Clause (Article I, Section 8, Clause 2) of the United States Constitution.

"[T]he result of our decisions is to make the sale of gas which crosses a state line at any stage of its move-

> ment from well-head to ultimate consumption 'in interstate commerce' within the meaning of the [Natural Gas Act]."
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> *California v. Lo-Vaca Gathering Co.*,
> 379 U.S. 366, 369 (1965)

This "interstate commerce" aspect of natural gas is the basis upon which the Commission establishes its jurisdiction for ratemaking and certification under Section 4, 5, and 7 of the Natural Gas Act (15 U.S.C. 717c, 717d and 717f).

This Court in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954), in considering the validity of a state tax levied upon a transfer of processed gas to a natural gas company, held that under the Commerce Clause of the Constitution, transportation in interstate commerce did not commence until the natural gas company took possession of the processed gas for ultimate delivery to the consumer. The gas in question had been dedicated or committed to interstate commerce by virtue of the certificate of public convenience and necessity previously issued by the Commission (the Federal Power Commission) allowing the natural gas company to transport and sell the natural gas in interstate commerce. For purposes of determining the appropriate constitutional standards, movement of natural gas in interstate commerce commences after the last step of preparing the gas for the first stages of distribution, has occurred, i.e., at the "tailgate" or outlet of the gathering and processing plant. Natural gas is considered in interstate commerce at the well-head for purposes of the ratemaking and certification jurisdiction of the Commission, and the Commission lacks jurisdiction over the natural gas between the well-head and the "tailgate" or outlet of the gathering, and processing plant as respect activities defined as uses by the First Use Tax which occur between those two points.

The contention of *amici* is that Section 1303 C of the First Use Tax statute is preempted by virtue of its conflict with

the exclusive jurisdiction of the Commission. This position is taken in reliance upon alleged facts, i.e, the existence of contracts between the producers of natural gas and the natural gas companies which require the producers to bear all costs (including taxes) associated with the processing of the natural gas produced from locations on the Outer Continental Shelf. These facts are not established by the pleadings. The absence of such essential facts negate any possibility of the rendition of a judgment on the pleadings. In essence their position is that, when the First Use Tax declared certain provisions that may be contained in some contracts or agreements authorizing the party liable for the First Use Tax to seek and obtain reimbursement of the tax from any party other than another purchaser, the State of Louisiana adopted a "regulation" conflicting with the exclusive jurisdiction of the Commission. Such is not and cannot be the case.

A proper reading of Section 1303 C readily reveals that the contract agreement provision deemed to be unenforceable is only conclusively so in the event a final definitive judgment is rendered to that effect. LSA-R.S. 47:1303 C (Act 293 of 1978). For Section 1303 C to have any effect whatsoever upon the exclusive jurisdiction of the Commission there must be a showing that contracts or agreements were in existence containing provisions declared to be "unenforceable."

If such contracts or agreements were in existence they would be under the jurisdiction of the Commission as contracts forming the basis of certificates authorizing transportation services. The Commission may authorize the deletion of any such reimbursement provisions from contracts which are part of the certificates of public convenience and necessity and then only pursuant to the procedures set forth in the Natural Gas Act. 15 U.S.C. 717c (d) and (e), 717d (a).

The statute clearly places certain options upon those owner-taxpayers having a contractual or agreement right of

reimbursement or refund from a party other than the purchaser of the gas. Those options are (1) seek to enforce the contractual or agreement provisions; (2) seek a judicial determination that the owner-taxpayer "is entitled to such reimbursement or refund;" or (3) seek a modification, change or amendment to the contract in conformity with the statute. The first two options would necessitate judicial action and the third option would necessitate the Commission's authorization.

This third option has in fact been exercised by certain owner-taxpayer natural gas companies and the Commission has in fact deleted all such reimbursement or refund provisions from those contracts in connection with the certificates of public convenience and necessity.[6] Thus, there exist no actual or potential conflict between the First Use Tax, more particularly Section 1303 C, and the exclusive jurisdiction of the Commission.

Notwithstanding the lack of a real and actual controversy because the Commission has modified all contracts and approved the pass on of the economic incidence of the First Use Tax, as a cost of service, to the ultimate purchasers and consumers of the gas, *amici* now throws out for consideration by this Court a "red herring" postulated as a "Catch-22" principle. This "red herring" is so postulated by *amici* on pages 5 and 6 of their brief, as follows:

> ". . . Because the First Use Tax falls principally on gas moving in interstate commerce, the Commission has been forced to promulgate regulations that would permit interstate pipelines to pass along in their rates the additional costs resulting from the imposition of the tax to their customers, subject to refund if the tax is ultimaely held to be unconstitutional . . . ."

6. See the Commission's Order No. 10, 43 Fed. Reg. 45553 (Oct. 3, 1978); Order No. 10-A, 43 Fed. Reg. 60438 (Dec. 28, 1978); Order No. 10-B, 43 Fed. Reg. 13460 (March 12, 1979), 44 Fed. Reg. 21330 (April 10, 1979) and 44 Fed. Reg. 46291 (Aug. 7, 1979).

It is upon this premise that *amici* attempt to create factual predicates to support their legal conclusions by which they seek to have this Court nullify the Louisiana First Use Tax.

Amici predicate their legal arguments upon the assumed factual basis that "the Louisiana Tax is on gas produced from . . . the Outer Continental Shelf" (Brief, p. 22). This factual assumption belies the clear and convincing language of the taxing statute and is supported by convoluted reasoning and the misapplication of legal precedents. Only a fact finding hearing can resolve the factual issue of what is being taxed by the Louisiana First Use Tax.

Further, *amici* assume factually "that such gas moves in interstate commerce" from the well-head to the ultimate consumer (Brief, p. 22). As heretofore shown, this factual assumption is contrary to both the law and the actual transportation of marketable gas in interstate commerce.

Amici further presume that there exists "exclusive federal regulatory jurisdiction over such gas" (Brief, p. 22) from the well-head to the ultimate consumer. This factual presumption negates the existence of Section 1 (b) of the Natural Gas Act.

On page 26 of the *amici* brief it is asserted that "Louisiana does not dispute the fact that each of the three categories of gas to which the First Use Tax applies — OCS gas, federal enclave gas, and imported gas, — moves in interstate commerce." This self-serving declaration of alleged undisputed facts is a misstatement of what is in Louisiana's answer. Louisiana, from the very inception of this matter, has denied that the First Use Tax applies to imported gas, a denial that for purposes of the present motion must be taken as true. Furthermore, Louisiana now reiterates its position that movement in interstate commerce of the natural gas consumed by the ultimate consumers only commences at the "tailgate" or outlet of the gath-

ering and processing plant. Not only are non-existent facts being assumed but factual disputes are being ignored in an attempt to formulate a theoretical factual situation whereby application of contrived legal theories and conclusions would seemingly nullify the First Use Tax as violative of the Supremacy Clause.

The various factual fallacies upon which the legal conclusions of *amici* are predicated suggest the need for a complete and accurate factual finding. Only after a true and complete factual development can the legal and constitutional issues posited by the original complaint be considered and resolved by this Court.

2. *Applicability of NGA and NGPA*

The Natural Gas Policy Act (§110) reflects congressional anticipation of state enactment of taxes which may have an impact on the price of natural gas to be paid by the ultimate consumer. This Court has held that within ratemaking authority of the Commission (Federal Power Commission then, and now the Federal Energy Regulatory Commission) taxes could be allowed as a cost of service in adjusting rates pertaining to the transportation and sale of natural gas.

> "In our view what the Commission did here did not exceed the powers granted to it by Congress. One of its statutory duties is to determine just and reasonable rates which will be sufficient to permit the company to recover its costs of service and a reasonable return on its investment. Cost of service is therefore a major focus of inquiry. Normally included as a cost of service is a proper allowance for taxes, including federal income taxes. The determination of this allowance, as a general proposition, is obviously within the jurisdiction of the Commission . . . ."
>
> *FPC v. United Gas Pipe* Line Co., 386 U.S. 237, 243 (1967)

Section 110 (a) (1) of the NGPA provides that state severance taxes are to be allowed as an additional cost over the maximum lawful price for the first sale of natural gas. Further, Section 110 (a) (2) of this Act provides that the first sale price of natural gas may exceed the maximum lawful price "to the extent necessary to recover . . . (2) any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission."

The Commission is thereby granted the discretionary authority to determine those costs of service incurred by the natural gas companies which may be passed on through rate charges[7] to the ultimate consumers of natural gas. This discretionary authority does not prohibit state taxation of local incidences, and more particularly, it does not prohibit the application of the First Use Tax to the various local uses of the natural gas within the State of Louisiana.

Factually, each of the statutorily enumerated uses has occurred in Louisiana for many years prior to the enactment of the First Use Tax. The statute merely identifies those local uses as appropriate incidents of taxation. Each statutorily enumerated use (LSA-R.S. 47:1302 (8)) was and is occurring consistent with certificates of public convenience and necessity issued by the Commission under Section 7 of the Natural Gas Act.

To determine whether state action "invalidly invade[s] the federal agency's [the Commission] exclusive domain" (*Northern Natural Gas Co. v. State Corp. Com.*) under the Natural Gas Act, the standard is "whether state authority can practicably regulate a given area and, if we find it cannot, then [the Court is] impelled to decide that federal authority gov-

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7. The Commission may also deny the pass on of certain cost of services under its ratemaking jurisdiction. *FPC v. United States Gas Pipe Line Co.*, 386 U.S. 237 (1967).

erns." *F.P.C. v. Transcontinental Gas Corp.*, 365 U.S. 1, 19, 20 (1961).

This Court has consistently opined that the "production or gathering" of natural gas is exempted from the federal regulatory domain by the terms of Section 1 (b) of the Natural Gas Act and that "production" and "gathering" are "terms narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Northern Natural Gas Co.* and the cases cited therein, 372 U.S. 84, 90 (1963). "Natual gas" is not in a state suitable for marketing or distribution at the time of its production.[8] And Louisiana is prepared to show that until (1) the central gathering of the original gas stream is accomplished, and (2) the substantial physical activities or uses to which it must be subjected at facilities and properties on shores are completed, and (3) the refined commodity reaches the "tailgate" or outlet of the gathering and processing plant for transmission by a natural gas company, there can be no marketing or initial distribution

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8. Examination of the contracts of sale executed between pipeline companies and producers, ostensibly approved in toto by the Commission, will reveal that what is purchased by the pipeline companies is not, and cannot, be delivered until the full gas stream as produced at the well, has been transported to shore and processed into the marketable commodity known by consumers as "natural gas." The consideration paid by the pipeline companies for this commodity is the price stated in the contract and approved by the Commission under the criteria of Sections 4 and 5 of the Natural Gas Act and/or the Natural Gas Policy Act as the just and reasonable price for each MCF of gas containing one million BTUs. The consideration paid to the producers for placing this commodity in a marketable condition is the value inherent in the liquefiables extracted and retained by the producers and/or processors. It is clear that the commodity purchased by the pipeline companies is dedicated to interstate commerce by virtue of its origin on the Outer Continental Shelf, albeit in globo with other definable commodities. It is equally clear that until this commodity, i.e., an MCF of gas containing one million BTUs and no corrosives, is deliverable and delivered the terms of the contract are not met and the marketing and initial distribution of the natural gas has not commenced.

thereof.[9]

The First Use Tax is imposed upon the following uses of natural gas in Louisiana: (1) sale; (2) the transportation in the state to the point of delivery at the inlet of any processing plant; (3) the transportation in the state of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; (4) transfer of possession or relinquishment of control at a delivery point in the state; (5) processing for the extraction of liquefiable component products or waste materials; (6) use in manufacturing; (7) treatment; and (8) other ascertainable action at a point within the state. LSA-R.S. 47:1302 (8). Louisiana is prepared to show that at least the first five uses enumerated are physical acts or activities necessary in preparing the natural gas "for its first state of distribution," (*Northern Natural Gas Co.* and the cases cited therein, 372 U.S. 84), and thus exempt from the federal regulatory scheme under Section 1 (b) of the Natural Gas Act. Since the activities or uses subject to taxation are not within the comprehensive federal regulatory scheme, it cannot be said that the First Use Tax "invalidly invade[s] the federal agency's [the Commission] exclusive domain." *Northern Natural Gas Co. v. State Corp. Com.*, 372 U.S. 84. The First Use Tax thus does not conflict with the regulatory authority of the Commission and is not preempted by the authority of the Commission.

Furthermore, the First Use Tax does not mandate any action by natural gas companies as a result of the imposition of the tax, nor does the tax attempt to regulate in any manner, directly or indirectly, the prices of interstate wholesale of natural gas.

Neither the Natural Gas Act, the Natural Gas Policy Act, nor any other federal act, prohibit state taxation of local

9. *Phillips Petroleum Co. v. State of Wisconsin*, 347 U.S. 672 (1954); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954); and *Interstate Natural Gas Company v. F.P.C.*, 331 U.S. 682 (1947).

incidences which may increase the price of the natural gas paid by the ultimate consumer.

B. *Outer Continental Shelf Lands Act*

Plaintiff States argue[10] that the First Use Tax is preempted by the Outer Continental Shelf Lands Act of 1953. Section 4 (a) (2) of the Act (72 U.S.C. §4(a) (2) (A) adopts state laws to the extent they are applicable and not inconsistent with federal laws and then concludes by providing that "[s]tate taxation laws shall not apply to the outer Continental Shelf." A review of the legislative history and the language of the entire section of the statute suggests that Congress intended the law to apply only within the physical limits of the OCS. House Report No. 413, 83rd Congress, First Session 1953, U.S. Code Congressional and Administrative News, 2180, does not use the statutory phrase, "shall not apply *to* the Outer Continental Shelf" but rather interprets it to mean, "cannot apply *in* these areas."

Even with this language in mind, plaintiff States attempt to justify and rationalize their contention that the incidences in Louisiana subject to the tax are in reality a tax on the severance or production of natural gas from the Outer Continental Shelf. This fanciful view of the tax cannot withstand scrutiny. The plain language of the Louisiana statute shows without doubt that the uses subject to the tax occur in the State of Louisiana. The tax does not reach any uses occurring in the Outer Continental Shelf.

Admittedly, Louisiana cannot directly tax the severance of natural gas from the OCS. That is not the same, however, as

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10. Apparently neither the Solicitor General nor the Commission have any faith in this argument for they refuse to even make mention of the spurious contentions by plaintiff States that the First Use Tax reaches the territorial boundaires of the Outer Continental Shelf.

saying that Louisiana and other States are forever prohibited from imposing any economic incidence upon items of commerce produced from the OCS.

Nothing in the Outer Continental Shelf Act, moreover, indicates broad preemptive intent, or intent to establish a comprehensive scheme to regulate natural resource development and distribution from the shelf. The goal of the statute, rather, was to assert American territorial ownership of the Shelf, and to permit the Secretary of the Interior to lease tracts for private natural resource development. Breeden[11] emphasizes that such state legislation as zoning and pollution laws are strictly local matters that are "peripheral concerns" with respect to the intended federal scheme and cites the following passage from the *San Diego Bldg. Trades Council* case, at footnote 184:

> "[D]ue regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the [federal regulation]."
>
> *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236 at 254 (1959)

Under this principle, state taxation, such as the First Use tax aimed at compensating the State for environmental damage, governmental costs, and other impacts *on state land* is clearly a concern "peripheral" to the federal scheme. Therefore, there exist no basis to support plaintiff States' contention of preemption in this regard.

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11. R. Breeden, *Federalism and the Development of Outer Continental Shelf Mineral Resources,* 28 Stan. L. Rev. 1107, 1147 (1976).

CONCLUSION

Enough has been said to demonstrate how unripe this case is for any definitive constitutional assessments of the validity of the Louisiana First Use Tax. Any judgment on the merits of the constitutional claims set forth in the motion for judgment on the pleadings could amount to nothing more than an advisory opinion with respect to possible facts and possible interpretations of the Louisiana statute.

The short of it is that the pending motion must be denied. To grant it would compel this Court to perform functions that are inappropriate and unnecessary, i.e., to interpret and to invalidate a state statute which is presently pending before the state court for definitive interpretation and application.

All the above and foregoing is thus respectfully submitted.

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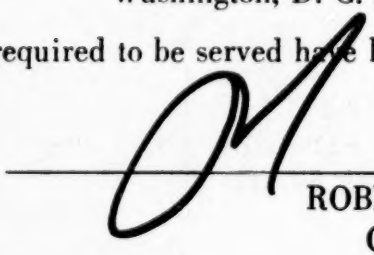
All parties required to be served have been served.



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Of Counsel

APPENDIX

19th JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

SOUTHERN NATURAL GAS COMPANY, TRANSCONTINENTAL GAS PIPE LINE CORPORATION, COLUMBIA GAS TRANSMISSION CORPORATION, FLORIDA GAS TRANSMISSION COMPANY, MICHIGAN WISCONSIN PIPE LINE COMPANY, NATURAL GAS PIPELINE COMPANY OF AMERICA, TENNESSEE GAS PIPELINE COMPANY (a division of Tenneco, Inc.), TEXAS EASTERN TRANSMISSION CORPORATION, TEXAS GAS TRANSMISSION CORPORATION, TRUNKLINE GAS COMPANY, UNITED GAS PIPE LINE COMPNAY, SEA ROBIN PIPELINE COMPANY, CONSOLIDATED GAS SUPPLY CORPORATION, EL PASO NATURAL GAS COMPANY, NORTHERN NATURAL GAS COMPANY, PANHANDLE EASTERN PIPE LINE COMPANY, and MISSISSIPPI RIVER TRANSMISSION CORPORATION,

Plaintiffs

v.

NO. 225,533

SECTION "D"

SHIRLEY McNAMARA, Secretary, Louisiana Department of Revenue and Taxation, THE LOUISIANA DEPARTMENT OF REVENUE AND TAXATION, and THE STATE OF LOUISIANA,

Defendants

PETITION FOR REFUND OF TAXES PAID UNDER PROTEST

Appearance Clause		Omitted from this copy.
¶¶ 1 and 5	Plaintiffs' status	Omitted from this copy.
¶¶ 2, 3 and 4	Defendants' status	Omitted from this copy.
¶¶ 6, 15, 16, 17, 18, 19, 20, 21 and 22	Description of Louisiana's First Use Tax Statute	Omitted from this copy.
¶¶ 7, 8, 9, 10, 11, 12, 13 and 14	Plaintiffs' liability for, and payment of, the taxes	Omitted from this copy.

23.

Petitioners assert that all "uses" contemplated by La. R.S. 47:1302(8) occur at some point in the transportation of gas owned by Petitioners in interstate commerce into or through the State of Louisiana and that none of such "uses" outlined in the statute can be constitutionally taxed, all for the following reasons:

Invalidity of the First Use Tax

24.

The First Use Tax statute, sometimes in conjunction with other Louisiana statutes, unfairly discriminates against interstate commerce in violation of the Commerce Clause, Article 1, Section 8 of the United States Constitution, for the following reasons, among others that may be proven at trial:

(a) The First Use Tax statute discriminates against owners of natural gas on which no severance tax or tax on the volume of production has been paid, which is produced in or outside of the boundaries of the State of Louisiana and which is moving in interstate commerce, by subjecting such gas to the First Use Tax, even though such gas undergoes the same uses within

the State of Louisiana as does gas upon which a severance tax or tax on the volume of production has been paid, which is produced in or outside of the state and which therefore is not subject to the First Use Tax.

(b) The First Use Tax statute exempts gas used or consumed in Louisiana for certain purposes or by certain taxpayers from liability for the tax, but denies these exemptions to other owners of gas or to gas transported through the State and used or consumed for similar purposes in other states, as described in paragraph 19 hereof.

(c) The First Use Tax statute, in conjunction with credit provisions contained in other Louisiana statutes referred to in paragraph 20 hereof, confers discriminatory tax advantages to owners of oil and gas produced within the boundaries of the State of Louisiana who also own gas subject to the First Use Tax, and discriminates against owners of gas subject to the First Use Tax who do not also own oil or gas produced within the boundaries of Louisiana or who do not have sufficient production within Louisiana to receive the same tax advantages.

(d) The First Use Tax statute, in conjunction with other Louisiana statutes referred to in paragraph 20 hereof, provides consumers and distributors of gas situated in Louisiana with a credit in the amount of increased costs attributable to the First Use Tax, against liability for other state taxes in the exact amount of such increased cost, thereby discriminating against consumers and distributors similarly situated in other states. Therefore, Petitioners' out of state customers will ultimately bear the burden of the First Use Tax, whereas consumers and distributors similarly situated in Louisiana will not.

25.

The First Use Tax statute unfairly burdens interstate commerce, is not fairly apportioned, tends to create multiple

burdens on interstate commerce, is not based upon a sufficient nexus between Louisiana and the property or activity sought to be taxed to justify its imposition, and is not fairly related to any cost or burden imposed upon Louisiana by the interstate commerce subject to the tax or to the value of any services or benefits provided by the State to such interstate commerce, in violation of the Commerce Clause, Article 1, Section 8 of the United States Constitution, and the Due Process Clauses of both the Fourteenth Amendment to the United States Constitution and Article 1, Section 2 of the Louisiana Constitution of 1974, for the following reasons, among others that may be proven at trial:

(a) The effect of the First Use Tax statute is to tax the gas itself as it moves in interstate commerce or, alternatively, to tax the privilege of transporting the gas in interstate commerce, rather than to tax the use of such gas, because the tax is imposed upon the owner of the gas rather than the person subjecting the gas to a "use" *qua* user, because the gas itself is subject to forfeiture for noncompliance with the statute, and because the tax is an unapportioned levy on a volume of gas transported in interstate commerce.

(b) The First Use Tax statute creates the risk of correlative taxation by other states resulting in multiple tax burdens on natural gas destined for consumption at the end of its interstate journey beyond the State of Louisiana because the tax is imposed on "uses" which are an integral part of the transportation of the gas in interstate commerce, some or all of which recur in every state through which the gas is transported, and because the tax is an unapportioned levy on a volume of gas transported in interstate commerce. The threat of such multiple burdens discriminates against the owners of interstate gas upon which no severance tax or tax upon the volume of production has been paid and which is transported beyond the State of Louisiana and discriminates in favor of

the owners of interstate and intrastate gas consumed within Louisiana.

(c) The First Use Tax is imposed upon a volume of gas which is transported in interstate commerce, and is not apportioned so as to relate only to the adverse impacts upon or benefits derived from the State of Louisiana as a result of the facilities or activities of each Petitioner within the State of Louisiana.

(d) The incidence of the First Use Tax is not realistically related to the expressed purposes of the statute; that is, compensating the citizens of Louisiana for damages to the coastal areas of Louisiana and preventing the physical and economic waste of Louisiana's natural resources.

(e) Some of the Petitioners receive natural gas from onshore federal enclaves located within the boundaries of the State of Louisiana. Because no severance tax or tax upon the volume of production has been paid on such gas, it is subject to the First Use Tax, even though the imposition of the tax on this gas is not related to the expressed purposes of the statute.

(f) The rate of the First Use Tax is the same as the rate of the severance tax on gas produced within Louisiana, but the impact, if any, resulting from any first "use" as defined in the statute within the State of Louisiana is wholly disproportionate to the impact resulting from severance.

(g) The impact of the First Use Tax is unrelated to (1) the activities of Petitioners in the State, (2) any possible adverse impact of such activities on the State, or (3) the benefits and services provided by the State, for all of which Petitioners pay other taxes, and/or for which the State of Louisiana has already been and will continue to be fully compensated pursuant to the Coastal Zone Management Act, 16 U.S.C. 1456(a).

(h) Neither the events giving rise to the application of the First Use Tax nor the natural gas subject to the tax have sufficient nexus with the State of Louisiana to

justify imposition of the tax. The temporary presence, sale, exchange, transfer of possession or control, or transportation of the gas within Louisiana is not a sufficient nexus to justify imposition of a tax measured by the total volume of the gas moving through the State.

26.

Some of the Petitioners have executed contracts with parties other than purchasers of natural gas, which contracts grant those parties the right to process natural gas owned or transported by said Petitioners for extraction of liquids or liquefiable hydrocarbons. Many of these contracts require those parties to reimburse said Petitioners for costs of separation or processing of natural gas for extraction of liquids or liquefiable hydrocarbons incurred by said Petitioners and/or for taxes associated with such liquids and liquefiable hydrocarbons incurred by said Petitioners. The contracts entitle said Petitioners to be reimbursed (by parties other than purchasers of natural gas from Petitioners) for First Use Taxes paid by said Petitioners in conjunction with transportation of gas by said Petitioners to such processing or separation facilities.

27.

The First Use Tax statute directly violates the Impairment of Contract Clauses of both the United States Constitution, Article I, Section 10, Clause 1, and the Louisiana Constitution of 1974, Article 1, Section 23, because La. R.S. 47:1303C declares invalid and unenforceable provisions in contracts that would provide reimbursement to owners of gas subject to the tax from persons other than purchasers of the gas. The First Use Tax statute should thus be declared null and void.

28.

If this Court should determine that La. R.S. 47:1303C is unconstitutional, but that the section is severable from other

provisions of the statute which are upheld, Petitioners aver that the provisions of 1978 La. Acts 294, Section 4, preclude their liability for the First Use Tax.

29.

Some of the Petitioners have executed contracts with parties other than purchasers of natural gas, under which those parties will be required to reimburse or refund to said Petitioners the Louisiana First Use Tax as a tax associated with the processing, for the extraction of liquid or liquefiable hydrocarbons, of the natural gas subject to such contracts. Said Petitioners will take appropriate action to enforce these contractual rights. In the event of a final and unappealable judicial decision upholding the enforceability of these contract provisions, 1978 La. Acts 294, Section 4(1) provides that no First Use Tax shall be due in respect to such natural gas, and that the taxes previously paid in respect thereto must be returned to said Petitioners, with interest as provided by law from the date the taxes were paid.

30.

Some of the Petitioners have executed contracts with parties other than purchasers of natural gas which require those parties to reimburse or refund to said Petitioners the Louisiana First Use Tax as a cost or expense incurred by virtue of separation or processing of natural gas. Said Petitioners will take appropriate action to enforce these contractual rights. Upon a final and unappealable judicial decision upholding the enforceability of these contractual provisions, 1978 La. Acts 294, Section 4(2) provides that the First Use Tax shall be null and void, and that all taxes previously paid must be returned to the taxpayers, together with interest as provided by law from the date the taxes were paid.

31.

The First Use Tax statute deprives each Petitioner of the equal protection of the laws guaranteed under the Fourteenth Amendment of the Constitution of the United States and under Article 1, Section 3 of the Louisiana Constitution of 1974 because it falls unequally on similarly situated taxpayers and similar uses, for the following reasons among others that may be proven at trial:

(a) Whereas the First Use Tax is directed entirely against natural gas pipelines, asserted damages to Louisiana's coastal areas, if any, will be shown to have resulted from many other types of activity by entities which receive the same services and benefits from the State of Louisiana as do the pipelines, none of which are burdened by the First Use Tax or any analogous tax.

(b) The First Use Tax statute discriminates in favor of owners of gas that is subjected to a first "use" in Louisiana as defined in the statute and on which a severance tax has been paid, and discriminates against owners of gas that is subjected to a first "use" in Louisiana as defined in the statute but on which a severance tax has *not* been paid. Nevertheless, the fact that a severance tax has or has not been paid bears no relation to the impact resulting from any first "use" within Louisiana.

32.

The First Use Tax statute is in conflict with and repugnant to federal statutes and is accordingly void under the Supremacy Clause, Article 6 of the United States Constitution, for the following reasons among others that may be proven at trial:

(a) Section 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. 1333, provides that "state taxation laws shall not apply" to the Outer Continental Shelf. Not-

withstanding the label given to it in the statute, the First Use Tax is, in economic effect, a tax on gas produced from the Outer Continental Shelf.

(b) The First Use Tax statute is in effect an attempt to regulate the transportation and/or sales of natural gas that is dedicated to interstate commerce by contracts and/or FERC certificates of public convenience and necessity pursuant to the Natural Gas Act, 15 U.S.C. 717, *et seq.* The sale and/or transportation of natural gas in interstate commerce is a matter within the exclusive jurisdiction of the Department of Energy and the Federal Energy Regulatory Commission and is beyond the reach of the State of Louisiana or any other state.

(c) The First Use Tax statute conflicts with and is repugnant to federal statutes, including the Outer Continental Shelf Lands Act, 43 U.S.C. 1331, *et seq.*, the Natural Gas Act, 15 U.S.C. 717, *et seq.*, and the Natural Gas Policy Act of 1978, Pub. L. No. 95-521 (1978), which constitute a comprehensive, exclusive and preemptive federal regulatory scheme duly adopted by Congress for the regulation, *inter alia*, of the sale and transportation of natural gas in interstate commerce.

33.

To the extent that the First Use Tax statute imposes a tax on gas produced from federal enclaves within the State of Louisiana, the Statute violates Article 1, Section 8, Clause 17 of the United States Constitution.

34.

In the event the First Use Tax statute imposes a tax on gas imported into Louisiana from a foreign country on which the United States does not now levy any import tax or tariff (19 U.S.C. 1202, Schedule 4, Item 475.15), the statute violates the Import-Export Clause of the United States Constitution, Article

1, Section 10, Clause 2, and the Commerce Clause, Article 1, Section 8 of the United States Constitution.

35.

The First Use Tax statute is ambiguous and vague and violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that it does not describe the activities upon which the tax is imposed with sufficient certainty. For example, the statute defines "use" as, among other things, "other ascertainable action at a point within the state." La. R.S. 13202(8).

36.

The First Use Tax statute is an attempt to tax indirectly natural gas not otherwise subject to severance taxes imposed by Louisiana or any other State, as is stated in Paragraph 14 above. Since Article 7, Section 4(B) of the Louisiana Constitution provides that "[n]o further or additional tax or license [other than the severance tax] shall be levied or imposed upon oil, gas, or sulphur leases or rights," the First Use Tax statute is repugnant to and void under Article 7, Section 4(B).

37.

Therefore, for the foregoing reasons as well as other reasons which will be shown at the time of trial, each of the Petitioners is entitled to recover the amount of First Use Tax paid by it under protest for the month of April, 1979, as specified in Paragraph 11 above, and all other purported First Use Tax liabilities for succeeding months paid under protest, together with interest thereon, as provided in La. R.S. 47:1576.

WHEREFORE, Petitioners Southern Natural Gas Company, Transcontinental Gas Pipe Line Corporation, Columbia Gas Transmission Corporation, Florida Gas Transmission Com-

pany, Michigan Wisconsin Pipe Line Company, Natural Gas Pipeline Company of America, Tennessee Gas Pipeline Company (a division of Tenneco, Inc.), Texas Eastern Transmission Corporation, Texas Gas Transmission Corporation, Trunkline Gas Company, United Gas Pipe Line Company, Sea Robin Pipeline Company, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company and Mississippi River Transmission Corporation, pray that Defendants Shirley McNamara, in her capacity as Secretary of the Department of Revenue and Taxation, the Louisiana Department of Revenue and Taxation, and the State of Louisiana be duly cited and served herein in accordance with law; that after due proceedings had, there be judgment herein in favor of each Petitioner and against said Defendants ordering and directing the refund to each Petitioner of all amounts of First Use Tax heretofore and hereafter paid under protest by each Petitioner together with interest as provided by law on all such taxes paid from date of receipt thereof under protest until the date of refund.

Each Petitioner further prays that Defendants be taxed for costs; and that the Court grant to each Petitioner such other and further relief as is just and appropriate in the circumstances of this case.

(Signatures of counsel omitted.)

Supreme Court, U. S.
FILED
MAY 25 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 83, ORIGINAL

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

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PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

BRIEF OF STATE OF ALABAMA IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE COMPLAINT

INTEREST OF AMICUS CURIAE

The State of Alabama is a substantial consumer of natural gas. The Louisiana First Use Tax ("First Use Tax") is imposing a weighty burden upon Alabama and its citizens, and is apt to cause the State grave economic decline. Alabama borders the Gulf of Mexico in close proximity to Louisiana; it is situated in a region different than any of

the eight plaintiff states. The immediate annual cost of the First Use Tax to Alabama, its instrumentalities, and its citizens is estimated to exceed 5 million dollars. Alabama's proprietary interest is to terminate the direct economic injury to the State and its instrumentalities. The State's interest, as *parens patriae*, is to arrest the mischief the First Use Tax is doing to the health, welfare, and economic life of Alabama's citizens.

ARGUMENT

The State of Alabama adopts and concurs in the eight plaintiff states' brief in support of their motion for leave to file a complaint. Alabama writes simply to emphasize the magnitude of the economic consequence of the First Use Tax and the urgency of an expeditious resolution of this discord.

The first dollars have been withdrawn from the Alabama treasury and from the pockets of the State's citizens to pay the First Use Tax. These payments began with the April billing collections of Alabama's natural gas distribution companies. For example, Alabama's largest, retail, natural gas distribution company, Alabama Gas Corporation ("Alagasco") serves approximately 346,000 residential, commercial, and industrial customers. Alagasco purchases 92% of its gas supply from Southern Natural Gas Company ("Southern"). Southern obtains the bulk of its general gas supply from southern and offshore Louisiana.

Southern and other pipelines are reimbursed for their payment of the First Use Tax by the operation of a "tracking mechanism" which was approved by the Federal Energy Regulatory Commission. Alagasco recoups from its customers all increases in the cost of its gas supply by the operation of the "Purchased Gas Adjustment Rider" ("PGA Rider"), a part of the company's rate schedules. Under Alagasco's PGA Rider purchased gas cost adjustments become effective with bills dated the fifteenth day following any date of change in supplier rates. In short, Alagasco and Southern have passed the First Use Tax on to consumers. Beginning April 15, 1979, Alagasco included the Tax in its statements of account to the State of Alabama, its instrumentalities, and its citizens.

The First Use Tax is being gathered subject to refund, pending a final judicial resolution respecting the constitutionality of the Tax. But in Alabama, the instant burden of the Tax is being suffered by individuals who use natural gas for cooking, bathing, heating, and other domestic purposes. Undoubtedly, in all of the affected states, people use natural gas in functions vital to their health and welfare. An increase in utility charges creates desparate conditions for many of Alabama's impoverished and fixed income citizens. The interests of impoverished citizens and the interests of persons on fixed incomes must be weighed when assessing the prudence of the course of leaving the question of the constitutionality of the First Use Tax to travel through the Louisiana courts. For some of these individuals, the increase in gas rates due to the First Use Tax may determine whether they can maintain this essential service. For these individuals the prospect of a refund after the ultimate decision of this case is no consolation.

Additionally, the amount of the First Use Tax increases as consumption increases. The burden imposed by the Tax will be greatest during the heating season when consumers are already facing the additional burden of higher fuel costs. The impact of the Tax in terms of human suffering is neither subject to measurement nor susceptible to compensation. Prior to the next heating season a terminal ruling on the constitutionality of the First Use Tax is urgently needed.

The First Use Tax also jeopardizes the health and welfare of Alabama's citizens by adversely touching commerce and industry. Provision for the collection of the First Use Tax subject to refund does not sufficiently mollify the hostile effects of the Tax upon the economies of the affected states. If this case is permitted to journey through the Louisiana courts prior to reaching this Court and the First Use Tax is ultimately determined to infringe the Constitution, the dollars which are refunded will have dissipated purchasing power. To any consumer, a dollar today is worth more than a dollar tomorrow or a year from now. Refund of the First Use Tax with interest will not fully compensate consumers either for missed opportunity costs or for the pillage of inflation. Refund will not restore business opportunities forgone, industries lost, or taxes uncollected by states which have large amounts of money removed from their economies by the First

Use Tax. The nation's precarious economic condition bespeaks the urgent want for a final decision of this matter.

CONCLUSION

The First Use Tax has a grave present impact upon the economies of the affected states and upon the lives of these states' citizens. Refund of the First Use Tax with interest will not fully compensate for the human suffering and deprivation, or the economic consequences resulting from present collection of the Tax. The original jurisdiction of the Supreme Court exists to remedy real and substantial injuries inflicted by one state upon others. Through the First Use Tax, by means contrary to the Constitution, Louisiana is imposing serious burdens upon her sisters. For these reasons, this Court should grant plaintiffs' Motion for Leave to File Complaint and should assume jurisdiction.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 83, ORIGINAL

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

BRIEF OF STATE OF ALABAMA IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE COMPLAINT

AFFIDAVIT OF PROOF OF SERVICE

State of Alabama Montgomery County

I, the undersigned, Assistant Attorney General Of Alabama, 64 North Union, Montgomery, Alabama 36130, hereby certify that I have deposited for Service, Airmail Postage Prepaid, three (3) printed copies of A Brief Of State Of Alabama In Support Of Plaintiffs' Motion For Leave To File Complaint to William J. Guste, Attorney General

Of Louisiana, 234 Loyola Building, Seventh Floor, New Orleans, Louisiana 70112; Stephen H. Sachs, Attorney General Of Maryland, 1400 One South Culvert Building, Baltimore, Maryland 21202; William J. Scott, Attorney General Of Illinois, 500 South Second, Springfield, Illinois 62706; Theodore L. Sendak, Attorney General Of Indiana, 219 State House, Indianapolis, Indiana 46204; Francis X. Bellotti, Attorney General Of Massachusetts, One Ashburton Place, Boston, Massachusetts 02108; Frank J. Kelly, Attorney General Of Michigan, 525 West Ottawa Street, Lansing, Michigan 48913; Robert Abrams, Attorney General Of New York, #2 World Trade Center, New York, New York 10047; Dennis J. Roberts, II, Attorney General Of Rhode Island, Providence County Courthouse, Providence, Rhode Island 02903; Bronson C. LaFollette, Attorney General Of Wisconsin, 114E State Capitol, Madison, Wisconsin 53702; Edward Berlin, Leva, Hawes, Symington, Martin And Oppenheimer, 815 Connecticut Ave. N.W., Washington, D. C. 20006, and sixty printed copies to The Clerk Of The Supreme Court Of The United States. This the 23rd day of May, 1979.

Assistant Attorney General
250 Administrative Building
Montgomery, Alabama 36130

Sworn to and subscribed before me the undersigned, this the 23rd day of May, 1979.

Notary Public.

FILED
1979
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

BRIEF AMICUS CURIAE OF AMERICAN GAS ASSOCIATION IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE COMPLAINT

GEORGE H. LAWRENCE
President
American Gas Association

by his attorneys:

DAVID J. MUCHOW
JOHN A. MYLER

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May 16, 1979

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INTEREST OF AMICUS CURIAE

The American Gas Association (A.G.A.) is the national representative of the natural gas industry, with approximately 300 member companies which provide gas utility service to the American public. The membership includes thirty-four pipe line (interstate and intrastate) companies, which transport natural gas from the points of production to the service lines of local gas distribution companies, and the large majority of privately owned distribution companies, which provide natural gas to residential, commercial and industrial users. Our membership supplies natural gas service to over 160 million customers in all 50 states.

The American Gas Association has a direct interest in this proceeding. The determination of whether Louisiana's First Use Tax on natural gas is constitutional is critical to the future of adequate natural gas service to consumers served by our membership. Should the State of Louisiana possess the lawful authority to impose this tax, similar taxes will undoubtedly follow in other states. The impact of such taxation on residential, commercial, and industrial consumers would be the encouragement of the use of fuels more costly and more damaging to the environment than natural gas. In addition, this tax is in egregious violation of the Commerce and Supremacy Clauses of the Constitution, as well as the other multiple violations alleged by plaintiffs.

The establishment of this tax is further in direct violation of national energy policy, which has been recently enunciated in the clearest possible terms by Congress, the President, and administrative agencies. That national energy policy is to substitute gas for imported oil by removing major price and other regulatory restrictions on gas use. To allow a single state to impose unfair financial burdens on consumers of natural gas in other states would be contrary to the federal national energy policy.

This brief is being submitted with the consent of the parties.

ARGUMENT

The purpose of this filing is to persuade this Court to grant plaintiffs' Motion for Leave to File Complaint and to assume jurisdiction over the merits of this controversy. The Louisiana First Use Tax violates multiple provisions of the Constitution. For purposes of jurisdictional determination, two constitutional violations are most evident.[1] Thus, our argument is in two parts:

I. The Tax Would Burden Interstate Commerce With Heavy Discriminatory Penalties Exceeding Three Billion Dollars (Commerce Clause, United States Constitution, Art. I, section 8, clause 3)

II. The Tax Is In Direct Conflict With Federal Legislative, Executive, and Administrative Mandates (Supremacy Clause, United States Constitution, Art. VI, clause 2)

I. THE TAX WOULD BURDEN INTERSTATE COMMERCE WITH HEAVY DISCRIMINATORY PENALTIES EXCEEDING THREE BILLION DOLLARS (Commerce Clause, United States Constitution, Art. I, section 8, clause 3)

A. *The Tax Applies to Natural Gas From The OCS*

The State of Louisiana, effective April 1, 1979, imposes a First Use Tax[2] of seven cents per thousand cubic feet ("Mcf") upon certain "uses" of natural gas within Louisiana when the gas is not otherwise subject to a severance, production or import tax imposed by any state, territory, or the United States. The tax applies primarily to natural

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[1] A.G.A. supports each of the allegations of Constitutional violations alleged in plaintiffs' Complaint. Our brief attempts to focus on why two constitutional violations make Supreme Court consideration particularly appropriate here.

[2] First Use Tax on Natural Gas, Act No. 294, 1978 La. Sess. Law Serv. 482 (West) (to be codified as LA. REV. STAT. ANN. SS 47: 1301-1307).

gas produced on the federal Outer Continental Shelf (OCS) and transported through Louisiana to consumers in other states. Louisiana intrastate producers liable for the tax obtain credit for such liability against the Louisiana severance tax. Intrastate customers thus do not pay the tax, while interstate customers do.

B. *The Tax Applies To Gas Which Is In Interstate Commerce*

The tax is imposed on natural gas which is moving in a continuous interstate stream. Natural gas is produced from wells on the OCS and flowed to a platform facility on the OCS, where liquids (water and various liquid hydrocarbons) are separated from the gas stream. The natural gas itself may also be dehydrated. After the producer performs these functions, the pipeline purchaser takes title and possession at the point of measurement (and delivery to the interstate pipeline system) on the offshore platform. The gas stream moves in continuous flow in interstate commerce thereafter.

C. *The Financial Impact On Consumers Is Severe and Wide-spread*

Plaintiffs have alleged that the First Use Tax will be imposed on approximately 3.190 billion Mcf of natural gas entering Louisiana in interstate commerce annually (which constitutes approximately 15 percent of gross national production of natural gas), resulting in costs to interstate consumers of approximately $225 million annually. A.G.A. believes these figures to be substantially correct.

Applying the 7 cent tax to current levels of production over the next 11 years, the Louisiana First Use Tax will costs interstate consumers well above $3 billion by 1991. By that time, approximately half of the recoverable

natural gas remaining on the OCS will have been depleted, based on our best estimates of the volume of natural gas remaining on the OCS available for production. Assuming the tax remains constant, another $3 billion plus would accrue to the State of Louisiana as the remaining volumes of natural gas are gathered from the OCS.

It is particularly appropriate that this Court assume jurisdiction over this controversy in view of the heavy financial impact of the Louisiana tax on consumers from plaintiff, and other, states. Pending litigation at the trial court level would provide no ultimate relief for several years.[3] It is sound judicial policy to avert damage caused by lengthy litigation where appropriate. It is respectfully submitted that a final determination of the constitutionality of Louisiana's First Use Tax should be made as quickly as possible.

The tax will in effect be directly imposed on consumers of natural gas in more than half of the Union, i.e. twenty-nine states, but not in Louisiana, a factor which weighs heavily in favor of immediate high court jurisdiction.

D. *Potential For Similar Taxes Is Great*

The "uses" upon which the tax is imposed and which are in actuality various aspects of the continous interstate journey of natural gas from the OCS to the ultimate consumers, include sales, the mere transportation of gas to

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[3] A suit filed in Louisiana state court by the State of Louisiana, seeking a declaratory judgement that the First Use Tax is constitutional, is presently in the discovery stage: *Edwin W. Edwards* v. *Transcontinental Gas Pipe Line Corp.*, No. 216867 (19th Judicial District Court, La., filed September 22, 1978). The action filed by the Federal Energy Regulatory Commission, *Fed. Energy Regulatory Comm'n* v. *McNamara*, Civil Action No. 78-384 (M.D. La., filed Sept. 29, 1978), alleging the tax to be unconstitutional, has been stayed pending termination of the state court proceeding. FERC has appealed the staying order.

various destinations within the state, and other ascertainable actions within Louisiana.

The nature of the gas industry would allow so many opportunities for analogous state taxes, should this tax be upheld, that natural gas could be assessed a vast tax burden borne ultimately by consumers.

Measurement facilities, for example, are located in every state through which natural gas passes, which includes all fifty states and the District of Columbia. Gas is transported within each state to such measurement facilities. Sales also take place in every state.

Should the Louisiana First Use Tax be upheld, similar taxes might be imposed by any and all of these states. For instance, OCS gas transported to Massachusetts travels through eleven states en route. Some, if not all, of the "uses" taxed by Louisiana occur in each of the eleven states. The effects of such multiple taxation would be intolerable.

II. THE TAX IS IN DIRECT CONFLICT WITH FEDERAL LEGISLATIVE, EXECUTIVE, AND ADMINISTRATIVE MANDATES (Supremacy Clause, United States Constitution, Art. VI, clause 2)

A. *The Louisiana First Use Tax Is In Direct Conflict With Preemptive Federal Legislation*

As local energy problems have grown into national energy crises, the need for national planning has intensified. Federal legislation over the past four decades reflects the growing national concern over energy resources, natural gas in particular, and has made these resources the object of comprehensive federal regulation.[4]

---

[4] See for example: 1938—Natural Gas Act (15 U.S.C. 717 *et seq.*) (assurance of reasonable rates through regulation of transportation and sale of natural gas); 1953—Outer Continental Shelf Lands Act (43 U.S.C. 1331 *et seq.*) (federal control over

(footnote continued)

Most recently, Congress has attempted to undo the damage caused by this country's dangerous reliance on imported oil by means of two particular pieces of legislation: the Department of Energy Organization Act and the Natural Gas Policy Act of 1978.

1. *The DOE Organization Act* (Pub. L. 95-91, Aug. 4, 1977, codified at 42 U.S.C. 7111 *et seq.*) was predicated on several Congressional findings, including (at Section 101);

> (1) the United States faces an increasing shortage of nonrenewable energy resources;
>
> (2) this energy shortage and our increasing dependence on foreign energy supplies present a serious threat to the national security of the United States and to the health, safety and welfare of its citizens;
>
> (3) a strong national energy program is needed...
>
> In Section 102, Congress outlined the goals toward which the Department of Energy (and the FERC, as a part thereof) must work, including:
>
> (9) to promote the interests of consumers through the provision of an adequate and *reliable supply of energy at the lowest reasonable costs*;... (emphasis added)
>
> (11) to provide for the cooperation of Federal, State, and local governments in the development and implementation of national energy policies and programs;

(footnote concluded)
exploration for development of removal and transportation of resources from the OCS; state taxation laws not applicable to OCS): 1974—The Federal Energy Administration Act of 1974 (Pub. L. 93-275; 88 Stat. 96) (regulation of scarce energy supplies); 1974—Energy Supply and Environmental Coordination Act of 1974 (Pub. L. 93-319; 88 Stat. 246) (provision of means to meet essential fuel needs consistent with environmental concerns).

(12) to foster and assure competition among parties engaged in the supply of energy and fuels;

Thus, the Louisiana First Use Tax is in direct conflict with the principles and purposes of the DOE Organization Act.

2. *Natural Gas Policy Act of 1978*

In 1978, Congress made a herculean legislative effort to assure for the future a reliable national supply of natural gas, while keeping prices at the lowest reasonable levels, in passage of the Natural Gas Policy Act of 1978 (92 Stat. 3350, Pub. L. No. 95-621). The Act uses a phased program of decontrol for various categories of natural gas. Price increases, set forth in a detailed scheme, were specifically designed to increase gas production while keeping gas prices for residential and commercial customers at the lowest possible level consistent with production needs.

Section 110 of the Act allows the ceiling prices of various categories of natural gas to be increased to reflect certain (i.e. severance) state taxes. Such costs would be passed through to purchasers pursuant to Section 203(a)(9). If they are not passed through, the producer must bear the burden. "Severance taxes" (which includes any tax "upon natural resource production"[5]) which were enacted after December 1, 1977, must, in order to be passed through, be equally applicable to interstate and intrastate commerce. The Louisiana First Use Tax Act would force the passthrough of its costs, despite the fact that the tax affects interstate commerce alone, as a result of the Louisiana First Use Tax on Natural Gas—Severance

[5] S. Rep. No. 95-1126, 95th Congress, 2d Session 91 (1978). Despite the instant tax being characterized as a "use" tax, a fair reading of the circumstances compels the conclusion that the NGPA definition of "severance" tax more properly applies.

Tax Credit, Act No. 436, 1978 La. Sess. Law Serv. 842 (West). The national interest behind the NGPA of 1978 is in direct conflict with the parochial interests reflected in the Louisiana statutes.

B. *The Louisiana First Use Tax Is in Direct Conflict with National Energy Policy Established by the Executive Branch and Implemented Administratively*

Since the passage of the National Energy Act, the encouragement of the use of natural gas has been a basic principle of our national policy and has been reflected in each step of the implementation of the Act[6] and in other related actions. In his Energy Message of April 5, 1979, President Carter called upon the nation's utilities and other major industrial users of oil to switch to natural gas wherever possible. The President indicated that, according to the Department of Energy, 500,000 barrels of oil per day could be displaced with natural gas beginning in 1980. The Louisiana Tax is in direct conflict with this national energy policy.

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[6] See Economic Regulatory Administration, Final Rule (10 CFR Part 508) issued under the Powerplant and Industrial Fuel Use Act of 1978, 44 *Fed. Reg.* 21230 ("Increased gas use would not only help protect the nation from the effect of any oil shortgages, but also would serve to cushion the impact of increasing world oil prices, which have a detrimental effect on the nation's balance of payments and domestic inflation rate."); FERC Docket RM79-21 (proposed rulemaking establishing protective alternate fuel prices for gas-burning industries); Speech of James Schlesinger, Secretary of Energy, before National Association of Petroleum Investment Analysts, January 9, 1979 (Natural gas should be used to displace foreign oil "wherever possible"); Letter from David J. Bardin, Administrator, Economic Regulatory Administration, to State Public Utility Commissions, January 5, 1979, encouraging shift from oil to natural gas.

It is beyond the pale of reasonable federal-state relations, especially in the modern national energy context, that the State of Louisiana can frustrate federal efforts to protect the interests of *all* states. Protracted litigation over the tax in lower courts, with application for Supreme Court review thereafter a near certainty, should not be tolerated, given our Nation's current energy crises. Final judicial pronouncement on the constitutionality of this tax, which will cost consumers 225 million dollars a year until its lawfulness is determined, should come as clearly and as quickly as possible.

CONCLUSION

For the reasons cited above, this Court should grant plaintiffs' Motion for Leave to File Complaint, and should assume jurisdiction.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND, *et al.*

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

BRIEF AMICUS CURIAE OF ASSOCIATED GAS DISTRIBUTORS IN SUPPORT OF PLAINTIFFS

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ASSOCIATED GAS DISTRIBUTORS
Company Members

Baltimore Gas and Electric Co.
Bay State Gas Co.
The Berkshire Gas Co.
Boston Gas Co.
Bristol & Warren Gas Co.
The Brooklyn Union Gas Co.
Cape Cod Gas Co.
Central Hudson Gas & Electric Corp.
Chesapeake Utilities Corp.
City of Holyoke, Mass., Gas & Electric Dept.
City of Westfield Gas & Electric Light Dept.
Commonwealth Gas Co.
Concord Natural Gas Corp.
The Connecticut Gas Co.
Consolidated Edison Company of New York, Inc.
Delmarva Power & Light Co.
Elizabethtown Gas Co.
Fall River Gas Co.
Fitchburg Gas & Electric Light Co.
Haverhill Gas Co.
Long Island Lighting Co.
Lowell Gas Co.
Lynchburg Gas Co.
Manchester Gas Co.
New Bedford Gas & Edison Light Co.
New Jersey Natural Gas Co.
New York State Electric & Gas Corp.
Northern Utilities, Inc.
The Pequot Gas Co.
Philadelphia Electric Co.
Philadelphia Gas Works
Providence Gas Co.
Public Service Company of North Carolina, Inc.
Public Service Electric & Gas Co.
Rochester Gas & Electric Corp.
South County Gas Co.
South Jersey Gas Co.
The Southern Connecticut Gas Co.
Tiverton Gas Co.
UGI Corporation
Valley Gas Co.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND, *et al.*,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

BRIEF AMICUS CURIAE OF ASSOCIATED GAS DISTRIBUTORS IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE COMPLAINT

INTEREST OF AMICUS CURIAE

Associated Gas Distributors (AGD) is an unincorporated association of gas distribution companies serving over eleven million customers along the eastern seaboard, or approximately 25 percent of the nation's interstate natural gas customers. More than half the gas purchased by AGD members is produced on the Outer Continental Shelf (OCS) of the United States and moved through Louisiana, thus being subjected to the First Use Tax imposed by that state.

The Federal Energy Regulatory Commission (FERC) has determined that the gas pipeline companies which have direct liability for the tax may recoup their tax payments from their customers, including the gas distributors represented in the AGD group. AGD members will in turn increase their rates to recover this expense from their consumer-customers. Depending on the the level of competitive fuel prices from time to time, the incidence of this tax at the retail market level may result in the loss of gas sales, especially in the highly price-sensitive industrial fuel market.

The First Use Tax is a substantial and unreasonable burden on the interstate transportation of natural gas. While the constitutional validity of the tax is being tested, however, other states may impose similar levies. Multiple taxes comparable to the Louisiana tax would be ruinous to the natural gas industry, including AGD members. A prompt resolution by this Court of the questions here presented is essential to the well-being of the natural gas industry and to the energy policy of this country.

AGD has a substantial and direct interest in this litigation. Its members also have an obligation, as public utilities, to protect their customers against the payment of excessive and unlawful charges. Accordingly, AGD submits the present brief amicus curiae in support of the plaintiffs.

CONSENT OF THE PARTIES

The written consent of the parties has been obtained for the filing of this brief and is attached to the original, signed copy hereof.

ARGUMENT

I. THE LOUISIANA FIRST USE TAX THRUSTS SUBSTANTIAL DIRECT AND INDIRECT ECONOMIC BURDENS ON THE CITIZENS OF A MAJORITY OF THE OTHER STATES

The gravity of the claim brought to this Court by the plaintiff states is readily apparent from the actual economic impact of the Louisiana First Use Tax on millions of citizens in these and other states.

The effect of the Louisiana First Use Tax statute[1] is to impose a seven cent per thousand cubic foot (Mcf) burden on (a) natural gas produced in the OCS and transported through Louisiana and (b) any natural gas imports landed in Louisiana and consumed in other states.[2] The volume of gas to which this tax applies

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[1]The text of the Louisiana First Use Tax on Natural Gas, Act No. 294, 1978 La. Sess. Law Serv. 482 (West) (to be codified as La. Rev. Stat. Ann. §§ 47:1301-1307) is reproduced as Exhibit A of Plaintiff's Complaint and its operation is explained beginning at page 7, paragraph V of the Complaint.

[2]Natural gas is scheduled to be imported into the U.S. through Louisiana upon the completion in the early 1980s of a liquefied natural gas terminal now under construction pursuant to a license issued to Trunkline LNG Company by the FERC's predecessor agency, the Federal Power Commission.

amounted, in 1977, to some 3.19 trillion cubic feet, or approximately 30 percent of the total annual volume of natural gas used that year by consumers dependent upon the nation's *interstate* gas supply system. Since this production volume is expected to increase in the future, the tax represents a *minimum* annual burden of about $225 million on the citizens and consumers who depend on gas supplies originating in the offshore Louisiana area.

The 11 interstate pipelines located in Louisiana transport this gas both to their wholesale customers and to direct industrial consumers. Through the many interconnections and pipeline-to-pipeline sales which characterize the interstate natural gas system, natural gas on which this tax is paid reaches an estimated 28 million residential, commercial and industrial customers in 29 states and the District of Columbia. Since both interstate pipeline companies *and* local gas utilities are subject to cost-based rate regulation, these companies are legally entitled to reflect this tax in higher rates to their customers, *i.e.*, the gas-consuming public in their service areas.

The economic or financial burden placed by this tax on individual citizens varies widely from state to state and among the classes of customers. Consumers using gas for space heating in the northeast will naturally pay a larger share of the $225 million than those in Georgia or Florida. Large volume industrial consumers can be expected to pay more of this tax burden than smaller residential and commercial gas

users. But the point here is not that this tax alone threatens economic disaster for any particular consumer in any given locality. Rather, it is that the Louisiana First Use Tax is so structured and applied that it effectively and directly attaches to interstate gas in over half of the states and thereby imposes a burden on about 62 percent of the nation's gas customers. The 28 million customers included in this percentage represent a substantially larger, although indeterminate, number of *citizens* affected by the tax; the precise number of affected citizens would depend on the number of affected persons per residential gas customer unit.

Given its scope and size, this tax represents a massive exploitation of these many states and citizens by a single state acting as a self-appointed "toll-keeper" surcharging each unit of gas produced in the federally owned and most prolific of all domestic geological basins. The Louisiana First Use Tax, therefore, represents a major political "coup" on the part of Louisiana, the most direct victims of which are located in the areas supplied with gas derived from the offshore Louisiana area. Louisiana has with this tax dramatically shifted the benefits and burdens flowing to different regions of the nation through the operation of the integrated network of interstate gas transmission and distribution companies.

Apart from its direct and immediate impact on a large number of both states and citizens, the First Use Tax brings with it the potential for considerably greater

economic burdens in the form of (a) duplicative taxes by other states, (b) the enactment of retaliatory taxes aimed at Louisiana citizens and (c) indirect economic burdens sustained by citizens of the states on which the burden of this tax will fall.

The likelihood of duplicative or similar taxes being enacted by other states is readily apparent, given the concept of the First Use Tax. Any state through which natural gas is transported to another state is a potential "toll-keeper" state since the events which trigger this tax — compression, metering, storage, transportation, processing, etc., — are routine characteristics of all interstate gas transmission operations. Those citizens located in the northern tier of states are exposed to duplicative taxes by 5 to 10 other states, depending on their particular geographic relationship to Louisiana and the route covered by the interstate pipelines through which gas travels to them. Only those states in which interstate pipelines happen to terminate would be unable to levy a toll of the kind exacted here by Louisiana.

The possibility that one or more states will enact taxes aimed at Louisiana citizens in retaliation for the First Use Tax is, of course, a matter of political speculation.

It is clear, however, that virtually every state is the source of some unique product marketed in other states, including Louisiana. Just as the citizens of the northern states tend to be dependent on Louisiana and

other southwestern states for energy supplies, Louisiana citizens depend on other states for steel, coal, automobiles, textiles, lumber, furs, and other basic consumer goods and raw materials. If the First Use Tax can be made a vehicle for surcharging non-Louisiana citizens for natural gas produced adjacent to Louisiana, surely first use taxes can be devised by other states to surcharge Louisiana citizens with respect to other basic commodities.

The indirect or secondary economic effects of the First Use Tax are at least as substantial as the direct effects. Any increase in the price of natural gas may cause industrial gas consumers equipped with other fuel-burning facilities to switch from natural gas to fuel oil or coal as a primary energy source.[3]

The additional demand for fuel oil which will result from increased industrial gas prices will raise fuel prices to all customers. Since both fuel oil and natural gas are primary fuels in the generation of electricity, the First Use Tax will result in undetermined but substantial increases in the cost of electricity sold to citizens in the

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[3]Most AGD members supply industrial consumers under "interruptible" contracts which permit the consumer to decide on a month-by-month basis, according to comparative prices, whether or not to contract for natural gas or fuel oil. In 1977, because of the price spread between gas and fuel oil, 2600 industrial consumers in New England alone terminated use of natural gas. American Gas Association, *Gas Facts* 69 (1978).

29 states where OCS gas subject to this tax is consumed.

The original jurisdiction of this Court was designed to provide a forum for grievances caused by "trade barriers, recrimination [and] intense commercial rivalries" between states. *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 450 (1945). *Accord, Pennsylvania* v. *West Virginia*, 262 U.S. 553, 596-600 (1922). The First Use Tax represents a classic example of the interstate tollkeeping which the Constitution prohibits. Taking advantage of its geographic position in relation to the nation's gas deposits, Louisiana has invented an ingenious and efficient mechanism for taxing millions of citizens in a large number of other, energy-dependent states. The prompt exercise of the Court's original jurisdiction in this case is required to review the merits of this tax and thereby limit the economic burden it imposes, directly and indirectly, on millions of gas-consuming citizens.

II. THE PLAINTIFFS ARE ENTITLED TO PRESENT THEIR CLAIM IN THIS COURT

In *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1976) this Court defined the conditions which make a case appropriate for the exercise of its original jurisdiction:

> [T]he question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it

> necessarily involves the availability of another forum where there is *jurisdiction over the named parties,* where the issues tendered may be litigated, and where appropriate relief may be had.

Id. at 93-94 (emphasis added). The case now before the Court satisfies that test. The "seriousness and dignity" of the instant Complaint is demonstrated in Section I, *supra.*

The named plaintiffs are properly before the Court as consumers of natural gas in their own right. Each plaintiff exercises a proprietary function in purchasing natural gas as fuel for its public buildings, schools, hospitals and other institutions. This proprietary capacity confers on the states a direct interest in the litigation. *Maryland* v. *Wirtz,* 392 U.S. 183 (1968). Furthermore, the states are entitled to sue as the representatives of their citizens who are natural gas consumers and who will collectively suffer significant economic injury as a result of the First Use Tax. *Hawaii* v. *Standard Oil Co.,* 405 U.S. 251 (1972). As described above, the plaintiff's claims are of significant economic magnitude. They also present important questions regarding the ability of states to shift their revenue burdens to citizens of other states.

A. The Plaintiff States Have No Forum Other Than This Court In Which To Present Their Claim.

Although two cases challenging the First Use Tax are presently pending in the state and federal courts in Louisiana, neither affords the plaintiffs a practicable litigation alternative. In *Edwards* v. *Transcontinental Gas Pipeline Corp.*, No. 216867 (19th Judicial District Court, La., filed September 22, 1978), the Governor and other Louisiana officials have filed an action for a declaratory judgment that the tax does not violate the United States Constitution, naming as defendants twenty-three pipeline companies which transport OCS gas through Louisiana. This action apparently will result in a nonappealable advisory opinion, since the pipelines are barred by state law from having collection of the tax restrained.[4]

Furthermore, there is a strong basis for concluding that the plaintiff and other gas consuming states, and *not* the interstate gas pipelines, are the real parties in interest in the *Edwards* case. As shown in Section I, the routine application of the gas rate-making/cost recovery system makes the interstate pipeline companies mere conduits for the collection of this tax. Each dollar of tax owned to Louisiana is automatically reflected in

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[4]La. Rev. Stat. Ann. §47:1575 (West) provides: "No court of this state shall issue any process whatsoever to restrain the collection of any tax, penalty, interest, or other charge imposed in this Sub-title."

pipeline rates and collected prior to payment to the tax collector. As *wholesalers* of a commodity in short supply, the interstate pipelines are virtually immune to any sales losses occasioned by the choice of fuel oil over natural gas made by industrial users in the *retail* marketplace. Gas volumes not sold in one region or state can, in today's circumstances, be delivered for resale in another region where retail competitive forces are favorable to gas. Whether the tax is finally invalidated or upheld is not a matter of real economic moment to the interstate pipelines.

Under these circumstances, it is imperative that this Court's original jurisdiction be exercised. The rejection of plaintiffs' motion would place the many millions of citizens on whom this tax ultimately rests under the protection of pipeline companies with little or no stake in the outcome of the litigation and no direct accountability to or contact with either these state governments or their citizens.

The second case presently pending in Louisiana, *FERC* v. *McNamara,* Civ. Action No. 78-384 (M.D. La., filed September 29, 1978), is a challenge by FERC to the constitutionality of the First Use Tax under the supremacy and commerce clauses of the Constitution. That case has been stayed pending a decision in the *Edwards* case, and therefore provides no immediate avenue of relief. The plaintiff states have no alternative to the instant action to achieve a reasonably prompt and

final adjudication of the validity of the First Use Tax.[5] Only assumption of jurisdiction by this Court will avoid the economic havoc of multiple unconstitutional taxes on the transportation of natural gas in interstate commerce.

B. The Decision In *Arizona* v. *New Mexico* Is Not A Basis For Denial Of The Plaintiff's Motion In This Case.

The facts in *Arizona* v. *New Mexico*, 425 U.S. 798 (1976) differ significantly from those in the instant case, and that decision does not provide a basis for denial of the plaintiffs' motion. The state of Arizona sued New Mexico, contending that New Mexico's tax on the generation of electricity violated, among others, the supremacy and commerce clauses of the Constitution. Pending at the time the *Arizona* v. *New Mexico* suit was filed was a federal district court action in which the Salt River Project Agricultural Improvement and Power District was a named plaintiff. The Salt River Project was a political subdivision of the Arizona state government and its representation of the state in the pending suit was a factor which the Court considered in denying Arizona's bill of complaint. 425 U.S. at 797-98. None of the plaintiffs in the instant action is a party in either of the presently pending actions in Louisiana.

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[5] *See Ohio* v. *Kentucky*, 410 U.S. 642, 644 (1973) ("Our object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented.")

A second important distinction between the present case and *Arizona* v. *New Mexico* is that collection of the challenged tax in the latter case was enjoined pending litigation of its constitutionality. In the instant case, liability for the tax is presently accruing. The plaintiffs are barred by the Anti-Injunction Act, 28 U.S.C. § 1341 (1976), from having the defendant enjoined from collection of the tax. Louisiana has established an escrow account to assure the refunding of the tax with 6 percent interest in the event it is found unconstitutional. The inadequacy of the refund remedy as a basis for protection of gas consumers has long been recognized by this court. *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962).

In his concurring opinion in *Arizona* v. *New Mexico*, Justice Stevens rested his agreement with the majority on Arizona's failure to allege that it would suffer any harm as a result of the tax and stated:

> Except to the extent that they apply to Arizona's attempt to litigate on behalf of an entity which has access to another forum, I do not believe the comments which the Court has previously made about its nonexclusive original jurisdiction adequately support an order denying a State leave to file a complaint against another State.

425 U.S. at 798. The plaintiffs have demonstrated that they have no remedy other than in this Court and that

they present serious economic and legal claims on their own behalf and in their own right. As shown above, plaintiffs are the real parties in interest. The Court is obligated under the Constitution and the applicable statutory law to assume jurisdiction in this case.

CONCLUSION

For the foregoing reasons, the Court should grant the plaintiff's Motion for Leave to File Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th Day of May, 1979, copies of the foregoing Brief of Amicus Curiae On Behalf of Associated Gas Distributors in Support of Plaintiffs were mailed, postage prepaid, to counsel for all parties of record.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND et al.

Plaintiffs,

v.

STATE OF LOUISIANA

Defendant.

BRIEF OF COLUMBIA GAS TRANSMISSION CORPORATION CONSOLIDATED GAS SUPPLY CORPORATION, EL PASO NATURAL GAS COMPANY, FLORIDA GAS TRANSMISSION COMPANY, MICHIGAN WISCONSIN PIPE LINE COMPANY, NATURAL GAS PIPELINE COMPANY OF AMERICA, NORTHERN NATURAL GAS COMPANY, SEA ROBIN PIPELINE COMPANY, SOUTHERN NATURAL GAS COMPANY, TENNESSEE GAS PIPELINE COMPANY A DIVISION OF TENNECO INC., TEXAS EASTERN TRANSMISSION CORPORATION, TRANSCONTINENTAL GAS PIPE LINE CORPORATION, TRUNKLINE GAS COMPANY and UNITED GAS PIPE LINE COMPANY AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE COMPLAINT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND et al.

Plaintiff,

v.

STATE OF LOUISIANA

Defendant.

BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE COMPLAINT

INTEREST OF AMICI CURIAE

Columbia Gas Transmission Corporation, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Florida Gas Transmission Company, Michigan Wisconsin Pipe Line Company, Natural Gas Pipeline Company of America, Northern Natural Gas Company, Sea Robin Pipeline Company, Southern Natural Gas Company, Tennessee Gas Pipeline Company, a Division of Tenneco Inc., Texas Eastern Transmission Corporation, Texas Gas Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company and United Gas Pipe Line Company (hereinafter "the pipeline companies"), support the motion of the eight plaintiff states for leave to file their complaint invoking the

original jurisdiction of this Court in order to challenge the constitutionality of the Louisiana First Use Tax on Natural Gas, La. R.S. 47-1301-1307 (hereinafter "First Use Tax").[1]

The pipeline companies are all natural gas companies as defined in Section 2 of the Natural Gas Act, 15 U.S.C. 717 *et seq.*, and are regulated by the Federal Energy Regulatory Commission (hereinafter "FERC"). The pipeline companies acquire natural gas produced offshore from the Outer Continental Shelf (a federal domain defined and delineated in the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.),* and transport the gas or have it transported in interstate commerce into or through the State of Louisiana, all under certificates of public convience and necessity issued by FERC and under rate schedules or tariffs approved by FERC.

The volume of gas subject to the First Use Tax is so great that it is estimated that, if sustained, the tax will generate revenues aggregating some $250 million a year for the State of Louisiana, all at the expense of the pipeline companies and the ultimate consumers served by them.

Because the pipeline companies are the owners of offshore gas when the various events described as "uses" in the Louisiana statute occur, the immediate incidence of the tax is upon them; it is they who are legally responsible for paying the Tax, and complying with the reporting requirements of the statute, La. R.S. 47;1305. Accordingly, the pipeline companies, as the

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[1]This brief is filed with the consent of the eight plaintiff states and the defendant State of Louisiana.

direct taxpayers of the First Use Tax, have an immediate economic interest in the outcome of this action.

They also have a proprietary interest as owners of the natural gas that is subject to the tax, and a proprietary interest in the taxes that they will be obligated to pay to the State of Louisiana.

The pipeline companies represent additional and broader interests than the plaintiff states, and certain aspects of the First Use Tax impinge only upon their interests.[2] Also, the pipeline companies realistically can be said to represent industry wide and even nationwide interests that are not adequately represented by the plaintiff states, and are thus in a unique position to show the economic impact of the First Use Tax.

ARGUMENT

The purpose of this brief is two-fold: (i) to support the motion of the plaintiff states for leave to file their complaint, and to urge the Court to accept jurisdiction over the merits of this controversy; and (ii) to notify all parties that, because of their vital economic interest in the outcome of this action, the pipeline companies will seek leave to intervene as plaintiffs if jurisdiction is accepted by the Court.

A. The Court Should Accept Jurisdiction of This Case

The structure and operation of the First Use Tax, the

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[2]For example, the "nullification clause" contained in the Louisiana statute (La. R.S. 47:1303C), which seeks to abrogate pre-existing contractual relationships, "is aimed only at a narrow class of persons, the pipeline companies". Brief of Plaintiffs in Support of Motion for Leave to File Complaint, at 34.

severe impact it could have on the national economy and the national energy policy (either alone or, even worse, in conjunction with similar taxes that could be imposed by other states through which the natural gas must pass on its interstate journey to the ultimate consumer), and the overriding constitutional issues raised by Louisiana's attempted imposition of the tax, have been set forth in considerable detail in the briefs already filed in this action.

As there shown, the First Use Tax is violative of the Commerce Clause (Article I, Section 8 of the United States Constitution), the Impairment of Contracts Clause (Article I, Section 10, Clause 1), the Equal Protection Clause (Amendment XIV), the Import-Export Clause (Article I, Section 10, Clause 2) and the Supremacy Clause (Article VI). The argument that the First Use Tax violates the Supremacy Clause is based on the contention that it is in conflict with and repugnant to various Acts of Congress, including the Outer Continental Shelf Lands Act (43 U.S.C. 1331 *et seq.)*, the Natural Gas Act (15 U.S.C. 717 *et seq.)* and the Natural Gas Policy Act of 1978 (Pub. L. No. 95-621 [1978]).[3]

To those showings, the pipeline companies would only add that the central and dispositive constitutional questions raised by this case, and the overriding economic and political impact of Louisiana's attempted imposition of the First Use Tax, make it all the more

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[3]The pipeline companies themselves have made essentially the same allegations in *Edwards* v. *Transcontinental Gas Pipe Line Corporation*, No. 216,867, Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana, a pending declaratory judgment proceeding initiated by the Governor and other officials of the State of Louisiana, against various pipeline companies and gas producers, seeking a declaration of constitutionality and validity with respect to the First Use Tax.

desirable that this Court accept jurisdiction, so that the merits of this controversy might be resolved as expeditiously as possible. Accordingly, the pipeline companies urge the Court to grant the plaintiffs' motion for leave to file their complaint and to accept original jurisdiction of this matter.

B. If Jurisdiction is Accepted by the Court, The Pipeline Companies Will Seek Leave to Intervene as Plaintiffs

In the event that the Court accepts jurisdiction of this case, the pipeline companies, because of their demonstrated distinct interest in the case, will file a petition to intervene as of right, as plaintiffs.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Court should grant plaintiffs' motion for leave to file complaint, and should assume jurisdiction of this matter.

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No. 83, Original

In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF MARYLAND, ET AL., PLAINTIFFS

v.

STATE OF LOUISIANA

ON MOTION FOR LEAVE TO FILE COMPLAINT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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ON MOTION FOR LEAVE TO FILE COMPLAINT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

This brief is filed pursuant to Rule 42(4) of this Court's Rules on behalf of the United States and the Federal Energy Regulatory Commission in support of Plaintiffs' motion for leave to file complaint.

JURISDICTION

Plaintiffs seek to invoke the original jurisdiction of this Court pursuant to the Constitution of the United States, Article III, Section 2, clauses 1 and 2, and 28 U.S.C. 1251(a)(1).

QUESTION PRESENTED

Whether this Court should exercise its original jurisdiction over a complaint filed against the State of Louisiana by eight States that consume natural gas, alleging that the Louisiana First Use Tax on gas from the Outer Continental Shelf and imported gas, is unconstitutional.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, clause 3 ("Commerce Clause"), Article I, Section 10, clause 1 ("Contract Clause") and clause 2 ("Import-Export Clause"), and Article VI, clause 2 ("Supremacy Clause") of the Constitution are set forth in Plaintiffs' Brief in Support of Motion for Leave to File Complaint, at 2-3. Article III, Section 2 of the Constitution provides in relevant part:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction.

28 U.S.C. 1251(a)(1) provides:

> (a) The Supreme Court shall have original and exclusive jurisdiction of:
>
> > (1) All controversies between two or more states: * * *

The relevant provisions of the Louisiana First Use Tax and related statutes are set forth in Exhibits

A and B to the motion for leave to file complaint and the complaint, in the appendix to Plaintiff's brief in support thereof.

THE INTEREST OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION

Plaintiff States seek leave to file an original complaint challenging a tax of seven cents per thousand cubic feet ("Mcf") imposed by the State of Louisiana on the first "use" of natural gas originating outside of that state that is being moved in interstate commerce. The principle impact of the tax is on gas produced from federally leased areas on the Outer Continental Shelf ("OCS gas"), and on gas imported from abroad. Because first "use" is defined so broadly as to include even the measurement of gas flowing in interstate commerce, the tax will add at least $225 million a year to the cost of gas used by consumers in other states.

As a consumer of natural gas in the operation of military and civilian installations, the United States is directly affected by these additional costs. As lessor of gas producing acreage on the Outer Continental Shelf (43 U.S.C. 1331-1343) and as responsible under the Constitution for the regulation of interstate and foreign commerce, and for the imposition of any duties on imports, the United States is directly concerned with any state tax that may improperly burden, or operate inconsistently with these functions.

In addition, the First Use Tax appears to conflict directly with the authority of the Federal Energy Regulatory Commission to regulate the interstate sales and transportation of natural gas and the costs and rates of pipelines, under the Natural Gas Act of 1938, ch. 556, 52 Stat. 821-833, 15 U.S.C. 717-717w, and the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350.

Although we believe that the tax is unconstitutional and in conflict with supervening federal regulation, the operation of the tax pending a final determination of its validity imposes substantial administrative and regulatory burdens. The tax has required the Commission to devise procedures that will permit interstate pipelines to recover in their rates the additional costs resulting from imposition of the tax, but that will also attempt to ensure that consumers will be fully reimbursed for the amount of the tax passed on to them if it is ultimately held to be unconstitutional. The United States and the Commission are therefore interested in the prompt resolution of the issues presented in the complaint herein.

STATEMENT

1. The Louisiana First Use Tax on Natural Gas [1] imposes a volume tax of seven cents per thousand

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[1] Act 294, 1978 La. Sess. Law Serv. 482 (West), to be codified as La. Rev. Stat. Ann. §§ 47:1301-47:1307 (West) (Mot. App. 1a-8a). Hereinafter, the various provisions of the act will be referred to by the section number to be used in the codification, and the act itself will be referred to as the "First Use Tax" or the "Act."

cubic feet (subject to certain exclusions), upon the first "use" within Louisiana of any natural gas that is not subject to any severance or production tax levied by Louisiana or any other state or territory of the United States, or is not subject to any import tax or tariff levied by the United States on imports from foreign countries. La. Rev. Stat. Ann. § 47:1303(A) (West) (Mot. App. 4a-5a). The term "use" is defined broadly as "[1] the sale; [2] the transportation in [Louisiana] to the point of delivery at the inlet of any processing plant; [3] the transportation in [Louisiana] of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; [4] transfer of possession or relinquishment of control at a delivery point in [Louisiana]; [5] processing for extraction of liquefiable component products or waste materials; [6] use in manufacturing; [7] treatment; [8] or other ascertainable action at a point within [Louisiana]." La. Rev. Stat. Ann. § 47:1302(8) (West) (Mot. App. 4a). The First Use Tax recites that it is "a cost associated with uses made by the owner in preparation of marketing of the natural gas[,]" (La. Rev. Stat. Ann. § 47:1303 (West)[2] and not a tax on the natural gas itself.[3] The First Use Tax also expressly

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[2] La. Rev. Stat. § 47:1302(9) (West) (Mot. App. 4a) defines "owner" as "the person having title to and the right to alienate the natural gas subject to the tax at the time a use occurs [Louisiana]."

[3] The First Use Tax statute recites that it is not imposed "on the production, severance, or ownership of natural gas produced outside of the boundaries of the State of Louisiana

abrogates provisions of existing contracts which underlie and form the basis for certificates of public convenience and necessity issued by the Commission concerning the apportionment of taxes among sellers, processors, and purchasers of gas. See La. Rev. Stat. Ann. § 47:1303(C) (West) (Mot. App. 5a).

2. There are presently pending two separate proceedings involving the validity of the First Use Tax. *Edwin W. Edwards, et al.* v. *Transcontinental Gas Pipeline Corp., et al.*, 19th Judicial District Court, Louisiana, No. 216867, filed September 22, 1978, is an action by the Governor and other officials of the State of Louisiana responsible for administration of the tax, against some twenty-three pipelines and producers allegedly liable to pay it. The Louisiana officials seek a declaration that the tax is valid under the Federal Constitution.

The Federal Energy Regulatory Commission has also instituted proceedings challenging the First Use Tax in a United States district court. *Federal Energy Regulatory Commission* v. *McNamara, et al.*, M.D. La. Civil Action No. 78-384, appeal pending 5th Cir. No. 79-1403. On January 26, 1979, the district court entered an order staying proceedings before it pending the outcome of the state court declara-

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* * * [and] that the incidence of this tax shall not be upon the natural gas nor upon the property or rights from which it is produced, but rather shall be only upon the privilege of performance or allowing the performance, by the owner of the enumerated actions comprising first use within [Louisiana]." La. Rev. Stat. Ann. § 46:1303(E) (West) (Mot. App. 6a).

tory judgment proceedings in *Edwin W. Edwards, et al.* v. *Transcontinental Gas Pipeline Corp., supra.* The district court's decision appears to have been based upon the abstention doctrine. The Commission has appealed (5th Cir. No. 79-1403), and oral argument is set for June 26, 1979.

It is probable that in the near future other actions challenging the validity of the First Use Tax will be filed in the Louisiana courts by interstate gas pipelines suing for recovery of amounts of the tax paid under protest. La. Rev. Stat. Ann. § 47:1576 (West). The Commission has authorized interstate pipelines to pass on in their rates the additional costs for natural gas which the pipelines incur as a result of the Louisiana First Use Tax. As a condition to this authorization, however, the pipelines are required to take all legal actions available to them to determine the constitutionality of the tax.[4]

The only statutory mechanism for challenging a state tax in Louisiana appears to be a suit for refund of the amounts paid under protest. La. Rev. Stat. Ann. § 47:1576 (West). Neither injunctive nor declaratory relief against collection of the tax is available. La. Rev. Stat. Ann. § 47:1575, § 47:1576 (West).

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[4] *State of Louisiana First Use Tax In Pipeline Rate Cases,* Docket No. RM78-23, Order No. 10, 43 Fed. Reg. 45553 (1978); Order No. 10-A, 43 Fed. Reg. 60438 (1978), Order No. 10-B, 44 Fed. Reg. 13460 (1979), petitions for review pending *sub nom. Tennessee Gas Pipeline Co., et al.* v. *Federal Energy Regulatory Commission,* No. 78-3816 (5th Cir.).

DISCUSSION

The proposed complaint sets forth five causes of action: that the First Use Tax constitutes an unreasonable burden on interstate commerce (Compl. 16-21); that it conflicts with federal statutes regulating the interstate transportation and sale of natural gas (Compl. 21-23); that as applied to imported gas it violates the Import-Export Clause (Compl. 23-24); that it impairs the obligation of contracts (Compl. 25); and that it violates the Fourteenth Amendment by depriving the plaintiff States and their citizens the equal protection of the law (Compl. 25-26). The United States and the Commission believe that the Plaintiff States have standing, that the issues are appropriate for consideration by this Court in the exercise of its original jurisdiction, and that those issues are substantial.

1. The Plaintiff States Have Standing

The Plaintiff States allege that the Louisiana First Use tax injures them directly in their capacities as substantial consumers of natural gas; they also sue as parens patriae for their citizens who are also consumers of natural gas (Compl. 12-16; Pl. Br. 12-13).

Insofar as the plaintiffs are seeking to protect their own propriety interests, we believe their standing is clear. The complaint effectively alleges "that the injury for which [plaintiffs] seek[] redress was directly caused by the actions of another State." *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 663 (1976).

Although plaintiffs' propriety interest provide a sufficient basis for their standing, we believe that plaintiffs also have standing to sue as parens patriae for their citizens. It is well established that a state may bring an original action on behalf of its citizens "when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania* v. *New Jersey, supra,* 426 U.S. at 665. See also *Hawaii* v. *Standard Oil Co.,* 405 U.S. 251, 258 (1972). The complaint in this case satisfies that test.

This is not a case like *Pennsylvania* v. *New Jersey, supra,* where the plaintiff States were simply seeking refunds of taxes imposed by the defendant states on the citizens of the former, who could have themselves challenged the tax and sought their own refunds. The tax in this case is not imposed on the citizens of the complaining states, but its economic burden falls primarily upon them in the form of higher rates passed through to them by the tax-paying producers and pipelines. Yet, they have no practical remedy against the allegedly unconstitutional exaction; indeed, Louisiana permits challenges to the validity of its taxes only by way of refund suits by the direct taxpayer. Instead, this case is, in our view, closely analogous to *Pennsylvania* v. *West Virginia,* 262 U.S. 553, 591-592 (1923), in which the Court held that a state may bring an original action to enjoin the withdrawal of natural gas from interstate commerce by another state.

2. This Case is Appropriate For the Exercise of Original Jurisdiction

This Court should exercise its original jurisdiction in this case because it is the most appropriate forum for litigation of the issues. In *Arizona* v. *New Mexico*, 425 U.S. 794 (1976), this Court denied the State of Arizona leave to file a complaint against the State of New Mexico challenging the constitutionality of New Mexico's electrical energy tax. The Court did so for prudential reasons, relying on the fact that, in that case, a pending state court action provided an appropriate forum for the litigation of the issues presented for this Court's resolution. 425 U.S. at 797. There, however, the three Arizona utilities affected by the tax were able effectively to protect their and the State's interest by refusing to pay the tax, and bringing a declaratory judgment action in a New Mexico court challenging its validity on the constitutional grounds as those presented by Arizona in its original complaint. After the litigation in the state courts, this Court recently held that tax invalid. *Arizona Public Service Co.* v. *Snead*, No. 77-1810 (April 19, 1979).[5] Thus, within three years of this Court's decision, the matter was

[5] The Court ruled that the generation tax was invalid under the Supremacy Clause, and Section 2121 (a) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1914, 15 U.S.C. 391. This statute, enacted by Congress in the exercise of its power to regulate interstate commerce, prohibits the States from imposing a tax on the generation or transmission of electricity that imposes a greater tax burden on electricity consumed outside of the taxing State than in it.

definitely resolved without any substantial disruption of the rate structure to interstate consumers as a result of the tax.

This case stands in stark contrast, and very different prudential considerations support the exercise of jurisdiction. The population in some 30 gas consuming states will be subject to millions of dollars in additional charges while the validity of the First Use Tax is tested. Interstate pipelines subject to the tax have no option but to pay it. Louisiana law does not permit taxpayers to refuse payment and challenge the validity of taxes in declaratory judgment actions. See Statement, *supra*, page 7.[6] In consequence, effective May 31, 1979, the first payment of the tax became due. La. Rev. Stat. Ann. § 47:1305 (B) (West). In anticipation of this liability, the interstate pipelines subject to the tax requested the Federal Energy Regulatory Commission to devise procedures by which the tax could be passed on rates to their customers, subject to appropriate refund when the tax is ultimately to be unconstitutional. The Commission responded to this request by authorizing a "tracking procedure" permitting automatic passthrough of the tax, provided that the pipelines meet certain requirements intended to insure that consumers will be completely reimbursed upon the invalidation of the tax.[7] The conditions for reimbursement,

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[6] The same principle applies under the Federal Internal Revenue Code. 26 U.S.C. 7421.

[7] See note 4, page 7, *supra*.

however, are being challenged by the pipelines in petitions for review of the Commission's orders. *Tennessee Gas Pipeline Co.* v. *FERC, et al.*, No. 78-3618 (5th Cir.).

Moreover, not only would this Court's declination of jurisdiction itself have significant consequences (unlike *Arizona* v. *New Mexico*, where no tax had been paid), but also none of the pending suits involving the constitutional validity of the First Use Tax is an appropriate vehicle for decision of the issues raised by the Plaintiff States. First, the state court declaratory judgment action by Louisiana officials (See Statement, *supra*, page 6) is in our view not maintainable under state law or reviewable by this Court under federal law. That suit appears to allege no legally cognizable injury by the named producer and pipeline defendants to the plaintiff officials. It raises the constitutionality of the First Use Tax only in anticipation of federal challenges to the tax that might be asserted by the defendant taxpayers in future refund actions. It is unlikely that such an action will lie under Louisiana law;[8] and it is even more doubtful that the declaratory judgment action presents an Article III case or controversy, since it appears essentially to request an advisory opinion. In these circumstances, it does not appear that review

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[8] See *Louisiana* v. *Board of Supervisors*, 84 So.2d 597 (La. 1955); see also, *Edwards* v. *Parker*, 332 So.2d 175, 176, 180 (La. 1976); *Petition of Sewerage and Water Board of New Orleans*, 177 So.2d 276, 277-278 (La. 1965); but cf. *In re Gulf Oxygen Welder's Supply Profit Sharing Plan and Trust Agreement*, 297 So.2d 663 (1974).

of the ultimate decision of the Louisiana courts would be available in this Court. See *e.g.*, *Doremus* v. *Board of Education*, 342 U.S. 429, 434 (1952). *Muskrat* v. *United States*, 219 U.S. 346, 361-363 (1911). Cf. *Babbitt, Gov. of Arizona* v. *United Farm Workers National Union*, No. 78-225, June 5, 1979, slip op. 13-14.

Second, the action brought by the Commission against Louisiana officials responsible for administration and enforcement of the First Use Tax overlaps only some of the issues tendered in the original complaint.[9] Moreover, neither the Plaintiff States, their residents, nor anyone representing the same interests are parties to that action, and the Commission's interests with respect to the various issues (and its standing to raise them) are quite different from the interests of the Plaintiff States. At all events, the Commisison's action has been indefinitely stayed by the district court on abstention grounds pending the outcome of the declaratory judgment proceeding in the state courts.[10]

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[9] The Commission seeks declaratory and injunctive relief on the ground that the tax interferes with the Commission's regulatory responsibilities under the Natural Gas Act and violates the Commerce Clause, impairs the obligations of contracts, is inconsistent with the import-export clause, and is invalid under the Supremacy Clause.

[10] While the Commission believes that the district court's stay of its action was improper, and is seeking reversal in the Fifth Circuit (*FERC* v. *McNamara, et al.*, No. 79-1403, scheduled for argument June 26, 1979) many months may pass before the court of appeals reaches its decision. Thereafter, if the Commission prevails, the case will have to be remanded to the district court to start again.

In sum, the prospects for prompt and decisive resolution of the issues presented in the complaint, without the prolonged imposition on consumers of very substantial additional costs, appear highly remote.[11] In these circumstances, we submit, the prudential considerations underlying the delination of jurisdiction *Arizona* v. *New Mexico* are inapplicable. The tax has already generated a cloud of complex litigation, none of which has even approached the merits. Many additional suits may be anticipated. Consumers are being subjected, while the litigation is in progress, to very substantial additional costs under a statute of highly doubtful constitutionality (see Pl. Br. 14-32). In our view, this case presents "a matter of grave public concern in which the state, as the representative of the public * * * has an interest apart from that of the individuals affected." *Pennsylvania* v. *West Virginia, supra,* 262 U.S. at 592.

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[11] Moreover, the possibility that in the future refunds will reach those who bear the ultimate economic burden of the tax, is also dubious. Precisely because of these doubts, this Court has held that the refund remedy is an inadequate protection for consumers under the Natural Gas Act. See *e.g., Federal Power Commission* v. *Hunt,* 376 U.S. 515, 524-525 (1964); accord, *Federal Power Commission* v. *Tennessee Gas Transmission Co.,* 371 U.S. 145, 154-155 (1962).

CONCLUSION

For the reasons stated, the Court should grant the Plaintiff-States' motion for leave to file their complaint in this Court.

Respectfully submitted.

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JUNE 1979

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 83, Original

STATE OF MARYLAND, et al.,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF ASSOCIATED GAS DISTRIBUTORS AND BRIEF AMICUS CURIAE

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October 23, 1979

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ASSOCIATED GAS DISTRIBUTORS
Company Members

Baltimore Gas and Electric Co.
Bay State Gas Co.
The Berkshire Gas Co.
Boston Gas Co.
Bristol & Warren Gas Co.
The Brooklyn Union Gas Co.
Cape Cod Gas Co.
Central Hudson Gas & Electric Corp.
Chesapeake Utilities Corp.
City of Holyoke, Mass., Gas & Electric Dept.
City of Westfield Gas & Electric Light Dept.
Commonwealth Gas Co.
Concord Natural Gas Corp.
The Connecticut Gas Co.
Consolidated Edison Company of New York, Inc.
Delmarva Power & Light Co.
Elizabethtown Gas Co.
Fall River Gas Co.
Fitchburg Gas & Electric Light Co.
Haverhill Gas Co.
Long Island Lighting Co.
Lowell Gas Co.
Lynchburg Gas Co.
Manchester Gas Co.
New Bedford Gas & Edison Light Co.
New Jersey Natural Gas Co.
New York State Electric & Gas Corp.
Northern Utilities, Inc.
The Pequot Gas Co.
Philadelphia Electric Co.
Philadelphia Gas Works
Providence Gas Co.
Public Service Company of North Carolina, Inc.
Public Service Electric & Gas Co.
Rochester Gas & Electric Corp.
South County Gas Co.
South Jersey Gas Co.
The Southern Connecticut Gas Co.
Tiverton Gas Co.
UGI Corporation
Valley Gas Co.
Washington Gas Light Co.

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Defendant.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Associated Gas Distributors (AGD)[1] hereby respectfully moves pursuant to Rule 42(3) for leave to file the attached brief as *amicus curiae* in this case. The consent of counsel for the plaintiffs has been obtained, but counsel for the defendant has objected.

[1]The AGD member companies are listed on the inside cover of this motion and brief.

I.
STATEMENT OF INTEREST

AGD is an unincorporated association of gas distribution companies serving over eleven million customers along this country's eastern seaboard, or approximately 25 percent of the nation's interstate natural gas customers. More than half the gas purchased by AGD members is produced on the Outer Continental Shelf (OCS) of the United States and transported through Louisiana, thus being subjected to the First Use Tax on Natural Gas (First Use Tax) imposed by that state.

AGD members are currently adversely affected by the First Use Tax. The Federal Energy Regulatory Commission (FERC) has approved a plan which permits the gas pipelines against whom the tax is levied to recoup the tax payments from their customers, the gas distributors. AGD member companies thus pay an additional 7 cents per thousand cubic feet (Mcf) of OCS gas and must pass the cost of the tax on to their customers, who are industrial, commercial and individual consumers of natural gas. AGD has a substantial and direct interest in this litigation.

II.
REASONS FOR GRANTING THE MOTION

The Louisiana First Use Tax is an unconstitutional levy on pipeline companies and, through them, gas distribution companies and consumers. The tax is in conflict with the federal scheme for the regulation of natural gas and is thus invalid under the Supremacy Clause of the Constitution. Furthermore, the tax discriminates against interstate com-

merce and cannot be fairly apportioned, a violation of the Commerce Clause of the Constitution.

The plaintiffs have consented to AGD's filing of a brief *amicus curiae.* The plaintiffs have interests which are generally similar to those of AGD. However, the plaintiff states cannot be expected to advance arguments which will treat specifically the interests of natural gas distributing companies whose competitive position is seriously threatened by the First Use Tax.

III.
CONCLUSION

Accordingly, and for the above reasons, Associated Gas Distributors respectfully urges the Court to grant the present motion so that AGD may present its views in the attached brief.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF ASSOCIATED GAS DISTRIBUTORS IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

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INTEREST OF AMICUS CURIAE

Associated Gas Distributors (AGD) is an unincorporated association of gas distribution companies serving over eleven million customers along the eastern seaboard, or approximately 25 percent of the nation's interstate natural

gas customers. More than half the gas purchased and resold by AGD companies is produced on the Outer Continental Shelf (OCS) of the United States and moved through Louisiana, thus being subjected to the First Use Tax imposed by that state.

The Federal Energy Regulatory Commission (FERC or the Commission) has permitted the interstate pipelines on which the Louisiana First Use Tax is levied to recoup the full amount of the tax from their customers. This has resulted in an assessment of 7 cents per thousand cubic feet (Mcf) of OCS-produced gas against the AGD members and, in turn, against their consumer-customers.

AGD companies, as public utilities, are legally obligated to protect the interests of their customers. The First Use Tax imposed by Louisiana is directly contrary to such interests because it adds significantly to the economic burdens of gas consumers. Further, the higher pipeline rates resulting from the First Use Tax are directly contrary to the interests of the AGD companies. The increased retail rates resulting from this tax impair the competitive position of gas in the fuels marketplace. Competitive considerations are especially important in large-volume industrial fuel markets since many industries have the capacity to switch from gas to other fuels depending on the comparative retail price of such fuels.

AGD submits this brief to supplement the legal arguments presented in the plaintiffs' Brief in Support of Motion for Judgment on the Pleadings. AGD fully supports the plaintiffs' motion and concurs in the arguments presented in their brief.

ARGUMENT

The Louisiana First Use Tax Violates The Supremacy Clause And The Commerce Clause Of The United States Constitution.

The State of Louisiana's First Use Tax on Natural Gas[1] (First Use Tax), which became effective on April 1, 1979, imposes a tax of 7 cents per Mcf on the first use[2] within Louisiana of any natural gas that is not subject to a severance or production tax in Louisiana or another state and is destined for consumption outside Louisiana. The tax is assessed against the owner of the gas at the time of the first use; the natural gas companies owning the pipelines through which gas is received from the production sources in the offshore Gulf of Mexico federal domain or Outer Continental Shelf Area (OCS) and transported to other regions of the country are thus liable for the tax in the first instance. The pipelines, under a plan approved by the FERC,[3] assess a charge equivalent to the tax against their customers (many of whom are members of AGD), who in turn are obliged to pass on the tax charge to their consumer-customers. The tax has a significant impact on both industrial and individual consumers throughout the eastern half of the nation; the FERC

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[1]La. Rev. Stat. Ann. § 47:1301 *et seq.* (West Supp. 1979). The complete text of the First Use Tax statute is printed as Appendix I to the plaintiff states' Brief in Support of Motion for Judgment on the Pleadings.

[2]"Use" is defined at La. Rev. Stat. Ann. § 47:1302(8) (West Supp. 1979) to include the sale, transfer of possession, relinquishment of control, processing, treatment, or transportation to various delivery points of natural gas.

[3]State of Louisiana First Use Tax in Pipeline Rate Cases Docket No. RM 78-23, Order No. 10-B, 44 Fed. Reg. 13460, (March 12, 1979).

has estimated the revenues to Louisiana from the first year of operation of the tax at $225,000,000.[4]

The First Use Tax is an impermissible intrusion on the authority of the FERC. It is in direct contravention of the regulatory scheme established in the Natural Gas Act of 1938[5] and the Natural Gas Policy Act of 1978,[6] and is in violation of the Supremacy Clause of the United States Constitution.[7] Furthermore, the First Use Tax discriminates against and unreasonably burdens interstate commerce by protecting gas produced within Louisiana and other states which impose a severance tax on gas from the use tax. In addition, the tax cannot be apportioned fairly; upholding this tax will invite other states to pass similar taxes, burdening interstate transportation of gas with the threat of multiple taxation. For these reasons, the tax is in violation of the Commerce Clause of the Constitution.[8]

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[4]State of Louisiana First Use Tax in Pipeline Rate Cases, Docket No. RM 78-23, Order Directing the Solicitor to seek Either an Order of the Court Permitting the Commission to Modify Its Orders or a Remand of the Record, App. A., issued July 13, 1979, 44 Fed. Reg. 46,921, 46,292 (Aug. 7, 1979).

[5]15 U.S.C. § § 717-717w (1976), *as amended by* Act of Nov. 9, 1978, Pub. L. No. 95-617, 92 Stat. 3167 (codified at 15 U.S.C.A. § § 717-717z (West 1974 and Supp. 1979).

[6]Pub. L. No. 95-62, 92 Stat. 3350 (codified at 15 U.S.C.A. § § 3301-3432 (West Supp. 1979).

[7]Article VI, clause 2 of the Constitution of the United States provides as follows:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof. . . ,shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

[8]Article I, section 8, clause 3 of the Constitution of the United States provides as follows:

> The Congress shall have power . . . to regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes.

I. The Louisiana First Use Tax Constitutes an Impermissible Intrusion on the Authority of the FERC Under the Natural Gas Act and is in Violation of the Supremacy Clause of the United States Constitution.

The Natural Gas Act was passed in 1938 with the dual purpose of providing uniform legislation in those areas in which individual states were powerless to regulate, and of ensuring that consumers of natural gas were afforded a "complete, permanent, and effective bond of protection from excessive rates and charges." *Atlantic Refining Co.* v. *Public Service Commission,* 360 U.S. 378, 388 (1959); *Accord, FPC* v. *Louisiana Power & Light Co.,* 406 U.S. 621 (1972). Federal regulation over natural gas resources was deemed essential in order to maintain a balance between the states which produce natural gas and those which consume it. The economic importance of a stable and effective regulation system has resulted in a broad construction of the authority of the Federal Power Commission (FPC) and its successor agency, the FERC, to administer and enforce the provisions of the Natural Gas Act.[9] *E.g., Permian Basin Area Rate Cases,* 390 U.S. 747, 784 (1968).

The Natural Gas Act bestows on the Commission authority to regulate (1) the transportation of natural gas in interstate commerce; (2) the sale for resale of natural gas; and (3) companies engaged in such transportation or sale.[10]

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[9]Both the FPC and the FERC will hereinafter sometimes be referred to as the Commission.

[10]Act Section 1(b), 15 U.S.C. § 717(b) (1976).

The Commission discharges this responsibility through its review and, where necessary, modification of private contracts submitted by parties seeking either to initiate gas service in interstate commerce or to modify the terms and conditions (including the price or rate) of such service.[11]

Pursuant to these powers, the Commission has reviewed and licensed hundreds of contracts submitted to it by gas producers covering their sale of OCS gas to interstate pipelines. Given the comprehensive scope of Commission authority with respect to the activity and services prescribed or authorized by such contracts, the Commission is vested with primary jurisdiction to resolve disputes, enforce provisions, and otherwise regulate the conditions pertaining to the performance of these contracts. *See FPC* v. *Louisiana Power & Light Co., supra,* at 642, 647-48 (1972); *Mississippi Power & Light Co.* v. *United Gas Pipe Line Co.,* 532 F.2d 412 (5th Cir. 1976), *cert. denied,* 429 U.S. 1094 (1977).

The First Use Tax enacted by Louisiana encroaches impermissibly on the Commission's authority and ability to regulate private contracts for the sale of natural gas. For example, section 1303C of that statute reads as follows:

> Any agreement or contract by which an owner of natural gas at the time a taxable use first occurs claims a right to

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[11] Contracts providing for the initiation of interstate gas service are subject to the licensing provisions of section 7 of the Act, 15 U.S.C. § 717f (1976). Contracts pertaining to changes in the rates or other terms of authorized service are subject to Commission adjudication in accordance with section 4 of the Act, 15 U.S.C. § 717c (1976).

> reimbursement or refund of such taxes from any other party in interest, other than a purchaser of such natural gas, is hereby declared to be against public policy and unenforceable to that extent.[12]

This provision purports to invalidate contract provisions (a) that have been licensed and approved by the Commission in orders issuing certificates of public convenience and necessity to OCS gas producers, and (b) that constitute an essential element of the Commission-enforced rate regulation from which gas consumers derive substantial benefits. *Permian Basin Area Rate Cases,* 390 U.S. 747, 784 (1968).

In licensing contracts for the sale of Louisiana OCS gas, the Commission has, in many cases, approved clauses in which the producer of the gas agrees to reimburse the pipeline purchaser for expenses incurred in delivering the gas to downstream processing plants (where the producer removes valuable liquids contained in the gas stream), including any present or future taxes incident to processing-related transportation.[13] Such clauses effectively shield the gas consumer from any expense associated with processing activity (from which the consumer derives no benefit) and therefore operate as a form of rate protection consistent with

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[12]La. Rev. Stat. Ann. § 47:1303C (West Supp. 1979).

[13]*See* FERC Docket No. RM 78-23, Order No. 10-B, 44 Fed. Reg. 13460, 13462 n.16 (March 12, 1979) ("Many [contracts containing provisions which would require a producer to pay the First Use Tax] have been incorporated into certificates of public convenience and necessity issued by this Commission and the Federal Power Commission. While the Natural Gas Policy Act of 1978, Pub. L. 95-621, 92 Stat. 3350 [eliminates certain requirements of the Natural Gas Act], many existing sales of natural gas, which are subject to the First Use Tax, remain subject to the regulatory structure of the Natural Gas Act.")

the overall design of the Natural Gas Act. The unilateral act on the part of Louisiana in invalidating such contract clauses to the detriment of interstate gas consumers is an unsupportable invasion of the authority of the Commission.

This Court has previously considered, and invalidated, attempts by a state to alter the terms of the contracts which the Commission has licensed. In *Northern Natural Gas Co.* v. *State Corporation Commission,* 372 U.S. 84 (1963), the Kansas State Corporation adopted an order which required the appellant, Northern, an interstate pipeline company, to purchase gas ratably from all wells connecting with its pipeline system in each gas field in the state. Such order was in direct derogation of a contract between Northern and Republic Natural Gas Company (Republic), a producer, which required Northern to purchase gas from Republic up to the maximum production allowables set by the Commission for such wells. Northern was thus in the position of being required either to purchase more gas than it was able to transport and sell or to violate its contract with Republic. This Court held that the state commission's order might indirectly interfere with the pipeline's federally regulated cost structure and with the eventual cost to wholesale customers and determined that the order was thus invalid. The court stated:

> [A]lthough collision between the state and federal regulation may not be an inevitable consequence, there lurks such imminent possibility of collision in orders purposely directed at interstate wholesale purchasers that the orders must be declared a nullity in order to assure the effectuation of the comprehensive federal regulation ordained by Congress.

372 U.S. at 92.

Louisiana's attempt to modify the contractual relationships between natural gas pipelines and producers trespasses on the rights of the parties to such contracts and encroaches on the authority Congress and this Court have placed firmly in the hands of the Commission.[14] By acting in a manner which sets aside a significant portion of the regulatory scheme established by Congress and administered by the Commission, Louisiana has acted in violation of the Supremacy Clause of the Constitution and the First Use Tax statute must be declared invalid. *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157-58 (1978); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977).

II. The First Use Tax Violates the Commerce Clause of the United States Constitution.

In *Department of Revenue* v. *Association of Washington Stevedoring Companies,* 435 U.S. 734, 750 (1978) this Court enumerated four requirements which must be met before a state tax affecting interstate commerce may be sustained. The tax must:

(1) be applied to an activity bearing a substantial nexus with the state;

(2) be fairly apportioned;

(3) not discriminate against interstate commerce; and

(4) be fairly related to the services provided by the state.

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[14] *See United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 344 (1956).

The First Use Tax unquestionably affects interstate commerce; this Court has held numerous times that the interstate transmission of gas constitutes such commerce. *E.g., FPC* v. *East Ohio Gas Co.,* 338 U.S. 464, 467 (1950); *United Fuel Gas Co.* v. *Hallanan,* 257 U.S. 277 (1921).

The First Use Tax cannot meet the *Department of Revenue* v. *Association of Washington Stevedoring Companies* standards because it discriminates against interstate commerce and it cannot be fairly apportioned.

A. The First Use Tax Discriminates Against Interstate Commerce.

As the plaintiffs have demonstrated,[15] the First Use Tax discriminates against pipeline companies that transport OCS gas through Louisiana and in favor of pipeline companies that transport gas produced in states, including Louisiana, imposing a severance tax against gas producers.

Pipelines purchasing gas that has been subject to a severance tax may or may not be required to absorb a portion of the tax. The proportion of the tax passed on to the pipeline company is a matter of contract; the Louisiana severance tax statute[16] in no way purports to affect the sharing of the tax burden. As demonstrated above, the First Use Tax statute voids that portion of any producer-pipeline contract that would allow the taxpayer-pipeline to recoup any portion of the First Use Tax payment from the producer. Thus, a

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[15] Plaintiffs' Brief in Support of Motion for Judgment on the Pleadings at 31-34.

[16] La. Rev. Stat. Ann. §§ 631-646 (West 1970).

pipeline transporting OCS gas through Louisiana will in every instance pay a tax of 7 cents per Mcf on the gas, while a pipeline transporting state-produced gas subject to a severance tax will pay only the amount established in the producer-pipeline contract—often far less than 7 cents per Mcf.

The impact of the First Use Tax statute is not borne by the pipeline companies. Those companies recoup the full amount of the tax from their gas distributor customers, who in turn recoup all or a portion of the tax from their consumer-customers. Thus, the retail cost of gas produced on the OCS may be up to 7 cents more per Mcf than gas produced in Louisiana.

AGD member companies are heavily reliant on OCS gas. In fact, more than half the gas purchased for distribution by the AGD companies is OCS gas, all of which is brought onshore through Louisiana. AGD members are thus subjected to a charge, the First Use Tax pass-through, that is not imposed against Louisiana distributors, who receive a tax credit that eliminates the burden of the First Use Tax.[17] The First Use Tax statute results in economic burdening of interstate gas distributors and consumers and favors Louisiana distributors and consumers. The tax provides a direct commercial advantage to local businesses at the expense of interstate commerce and is prohibited under *Boston Stock Exchange* v. *State Tax Commission,* 429 U.S. 318, 329 (1977) and *Halliburton Oil Well Cementing Co.* v. *Reily,* 373 U.S. 64, 70 (1963).

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[17]La. Rev. Stat. Ann. § 47:647 (West Supp. 1979).

The economic protectionism exhibited in the First Use Tax might be supportable if it could be viewed as a "law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Philadelphia* v. *New Jersey,* 437 U.S. 617, 624 (1978). Without questioning the legitimacy of its purposes, the effect of the First Use Tax, imposing an expected increase of $225,000,000 in the rates paid by gas consumers, can hardly be deemed incidental.

Further, a tax which burdens interstate commerce, no matter how legitimate, may be struck down if a less burdensome alternative is available. *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). The less burdensome alternative Louisiana could have chosen was to allow the cost of the First Use Tax to be absorbed, where contractual terms so provided, by the gas producer.

Because the First Use Tax results in privileges for Louisiana pipeline companies, distribution companies and consumers to the detriment of their counterparts in other "downstream" states, the tax must be held discriminatory and in violation of the Commerce Clause of the Constitution.

B. The First Use Tax Cannot be Fairly Apportioned and Poses a Threat of Multiple Taxation.

No state may impose a tax on any aspect of interstate commerce which subjects it to "cumulative burdens not imposed on local commerce." *Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250, 255-56 (1938). The well-founded policy supporting this rule is that enterprises should be encouraged to engage freely in interstate commerce rather

than doing business only in one or a few states.[18] The Court has recently held that the movement of goods in interstate commerce is subject to taxation by individual states, but only where such tax is capable of being reasonably apportioned. *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 286 (1977); *see Colonial Pipeline* v. *Traigle,* 421 U.S. 100 (1975).

The First Use Tax is not capable of being apportioned fairly because it is levied on the full volume of the gas flowing through Louisiana. The tax bears no relation to the proportion of each company's pipeline which is in Louisiana or to the apportioned value of the activity carried on by each taxpayer enterprise in Louisiana.

In *Michigan-Wisconsin Pipeline Co.* v. *Calvert,* 347 U.S. 157 (1954), this Court invalidated a Texas statute imposing a tax on the gathering of gas into a pipeline, holding, first, that the tax was impermissibly levied simply on movement of the gas in interstate commerce, and, second, that upholding the tax would invite other states to tax the first "taking" of the gas at their borders, resulting in resurrection of "the customs barriers which the Commerce Clause was designed to eliminate." 347 U.S. at 170.[19]

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[18] *Developments in the Law, Federal Limitations on State Taxation of Interstate Business,* 75 Harv. L. Rev. 953, 964 (1962).

[19] This decision was recently reaffirmed by this Court in *Department of Revenue* v. *Ass'n of Washington Stevedoring Companies,* 435 U.S. 734, 749 (1978):

> Today's decision does not question the *Michigan-Wisconsin* judgment, because Washington apportions its business and occupation tax to activity within the State. Taxes that are not so apportioned remain vulnerable to Commerce Clause attack.

The First Use Tax presents a threat of proliferation of similar state taxes identical to the threat which resulted in the striking down of the tax in the *Michigan-Wisconsin case*. If Louisiana is allowed to tax the first sale, transportation to a processing or storage facility, measuring, manufacturing, or other use of gas, every other state in which a pipeline is located will have license to do likewise. The rates which consumers pay for gas would then depend not on factors rightfully regulated by the Commission under the Natural Gas Act, but on the number of states through which the gas passes before reaching its point of distribution. Natural gas will not be a competitive source of fuel in any state except those which produce it and the adjacent or nearly adjacent states. Such a result is clearly prohibited under the Commerce Clause.

CONCLUSION

For the foregoing reasons, AGD respectfully submits that the Louisiana First Use Tax on Natural Gas violates both the Supremacy Clause and the Commerce Clause of the United States Constitution and must be declared invalid.

Certificate of Service

I hereby certify that on this 23rd day of October, 1979, three copies of the foregoing Motion for Leave to File Brief *Amicus Curiae* On Behalf of Associated Gas Distributors and Brief Amicus Curiae were mailed, postage prepaid, to all counsel of record.

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IN THE

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OCTOBER TERM, 1979

No. 83, Original

STATE OF MARYLAND, *et al.*,

Plaintiffs

v.

STATE OF LOUISIANA,

Defendant

MOTION OF INDICATED PIPELINE COMPANIES FOR LEAVE TO FILE AND MOTION FOR JUDGMENT ON THE PLEADINGS WITH ACCOMPANYING BRIEF

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v.

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Defendant

MOTION OF INDICATED PIPELINE COMPANIES FOR LEAVE TO FILE MOTION FOR JUDGMENT ON THE PLEADINGS WITH ACCOMPANYING BRIEF

The indicated pipeline companies* respectfully move the Court for leave to file the attached Motion for Judgment on the Pleadings with accompanying brief, and in support of this motion show:

*Columbia Gas Transmission Corporation, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Florida Gas Transmissin Company, Michigan Wisconsin Pipe Line Company, Mississippi River Transmission Corporation, Natural Gas Pipeline Company of America, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Sea Robin Pipeline Company, Southern Natural Gas Company, Tennessee Gas Pipeline Company, a division of Tenneco, Inc., Texas Eastern Transmission Corporation, Texas Gas Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, and United Gas Pipe Line Company ("indicated pipeline companies" or "pipeline companies").

1.

On August 28, 1979, the pipeline companies moved for leave to intervene as plaintiffs in this action on the basis that, as the persons responsible for payment of Louisiana's First Use Tax on Natural Gas, they have significantly protectable interests at issue in this litigation which are not adequately represented by any other party, and that their intervention is appropriate to aid in the resolution of issues directly affecting their interests. The Court has not yet acted on their motion for leave to intervene.*

2.

On September 18, 1979, the plaintiffs moved for judgment on the pleadings. Louisiana responded to that motion on October 22, 1979 and also moved to dismiss the case on jurisdictional grounds.

3.

The pipeline companies believe that this case can and should be disposed of summarily, and that, as intervening plaintiffs, they can contribute significantly to the development and presentation of the issues which the Court must consider in order to decide any motion for summary disposition.

---

* The plaintiffs do not opose the pipeline companies' intervention, but Louisiana has filed an opposition to the intervention. On October 9, 1979, the pipeline companies filed a response to that opposition.

WHEREFORE, the pipeline companies pray that they be allowed to file the attached Motion for Judgment on the Pleadings with accompanying brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 83, Original

STATE OF MARYLAND, *et al.*,

Plaintiffs

v.

STATE OF LOUISIANA,

Defendant

MOTION FOR JUDGMENT ON THE PLEADINGS

The pipeline companies respectfully move the Court for judgment on the pleadings, and in support show that on the basis of the pleadings on file herein, there exists no genuine issue of material fact as to the invalidity of Louisiana's First Use Tax on Natural Gas under the constitution and laws of the United States.

WHEREFORE, the pipeline companies pray that judgment be rendered herein in their favor, declaring Louisiana's First Use Tax on Natural Gas void and unenforceable.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1979

No. 83, Original

STATE OF MARYLAND, *et al.*,

Plaintiffs

v.

STATE OF LOUISIANA,

Defendant

BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

JURISDICTION

The States of Maryland, Illinois, Indiana, Massachusetts, Michigan, New York, Rhode Island and Wisconsin ("plaintiffs"), have invoked the original jurisdiction of this Court to challenge the constitutionality of the Louisiana First Use Tax on Natural Gas, La. R.S. 47:1301-07 ("First Use Tax"). Original exclusive jurisdiction in this Court of the plaintiffs' action is established by article III, §2, clauses 1 and 2 of the United States Constitution and 28 U.S.C. 1251(a).

The pipeline companies, as the persons responsible for payment of the First Use Tax, have moved for leave to

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intervene to assert and protect their significant interests. Original jurisdiction in this Court of the pipeline companies' action is also established by article III, §2, clauses 1 and 2 of the United States Constitution.

QUESTIONS PRESENTED

1. Whether the First Use Tax is void under the Supremacy Clause of the United States Constitution because it

(a) invades the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC" or Commission") under the Natural Gas Act ("NGA"), 15 U.S.C. 717, *et seq.*, to regulate the transportation and sale for resale of natural gas in interstate commerce (related to this issue is whether the First Use Tax prevents the Commission from discharging its responsibilities under Section 110 of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. 3301, *et seq.);* and

(b) conflicts with the express provisions, and prevents the accomplishment and execution of the purposes and objectives, of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. 1331, *et seq.*, and interferes with the comprehensive, preemptive scheme of the OCSLA and the Coastal Zone Management Act ("CZMA"), 16 U.S.C. 1451, *et seq.*, which regulates, and compensates for, the effects of coastal energy resource development.

2. Whether the First Use Tax violates the Commerce Clause of the United States Constitution because it (a) is not fairly apportioned and creates the risk of multiple taxation; and (b) discriminates against interstate commerce.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article 1, §8, clause 3 of the United States Constitution provides:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and wth the Indian Tribes.

2. Article VI, clause 2 of the United States Constiution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

3. Sections of the NGA cited herein are set out in full in Appendix A.

4. Sections of the NGPA cited herein are set out in full in Appendix B.

5. Sections of the CZMA cited herein are set out in full in Appendix C.

6. Sections of the OCSLA cited herein are set out in full in Appendix D.

7. The First Use Tax on Natural Gas, Act 294 of 1978, La. R.S. 47:1301-1307, is set out in full in Appendix E.

8. Sections of the Louisiana General Severance Tax, La. R.S. 47:631, *et seq.*, including the First Use Tax on Natural Gas — Severance Tax Credit, La. R.S. 47:647, are set out in full in Appendix F.

9. The Tax Credit for Electric and Natural Gas Service, La. R.S. 47:11, is set out in full in Appendix G.

STATEMENT

The State of Louisiana, by Act No. 294 of 1978, enacted the First Use Tax on Natural Gas, which imposes a tax of seven cents per Mcf on "natural gas upon which no severance tax or tax upon the volume of production has been paid, or is legally due to be paid, to [Louisiana] or any other state or territory of the United States, or which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country." La. R.S. 47:1303A.

The stated purpose of the tax is to compensate Louisiana's citizens for alleged "costs incurred and paid with public funds, which costs enure solely to the benefit of the owners of natural gas produced beyond the boundaries of Louisiana" and to reimburse Louisiana's citizens for alleged "damages to the state's waterbottoms, barrier reefs, and sensitive shorelands as a direct consequence of activity within the state associated with such natural gas." La. R.S. 47:1301C.

The purported incidence of the tax is on "use" of the gas within Louisiana, defined as:

> the sale; the transportation in the state to the point of delivery at the inlet of any processing plant; the transportation in the state of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; transfer of possession or relinquishment of control at a delivery point in the state; processing for the extraction of liquefiable component products or waste materials; use in manufacturing; treatment; or other ascertainable action at a point within the state. La. R.S. 47:1302(8).

However, gas otherwise subject to the tax is exempt if it is ultimately used or consumed in Louisiana for certain specified purposes, including "the drilling for or production of oil, natural gas, sulphur," "the manufacture of fertilizer and anhydrous ammonia,"and processing for the extraction of liquefiable hydrocarbons. La. R.S. 47:1303A.

Additionally, as part of the First Use Tax package, the Louisiana legislature enacted the Severance Tax Credit, which grants to producers of natural resources in Louisiana who are also First Use Tax taxpayers, a direct tax credit, equal to the amount of First Use Tax paid, against severance taxes owed by that taxpayer to the state; and the Tax Credit for Electric and Natural Gas Service, which grants to Louisiana utilities and direct purchasers of natural gas a direct tax credit, against any other Louisiana tax liability, to compensate for increased natural gas costs attributable to the First Use Tax.

The tax is payable by the owners of the gas. La. R.S. 47:1305A. The statute declares "as against public policy," and makes unenforceable, any contractual provision which would entitle the owner of natural gas subjected to a "use" in Louisiana to recover the amount of taxes paid from any person other than a purchaser of the gas. La. R.S. 47:1303C. If for any reason the owner of natural gas subjected to a first "use" fails to comply with the reporting and payment provisions of the First Use Tax, the statute mandates that the gas subject to the tax "shall be treated as contraband and shall be seized and sold." La. R.S. 47: 1306B.

The pipeline companies are natural gas companies as defined in Section 2 of the NGA, and are regulated by FERC. They acquire natural gas produced from the outer continental shelf (a federal domain beyond the territorial boundaries of Louisiana, defined and delineated in the OCSLA) and from onshore federal enclaves, and transport said gas through their own pipeline systems or have it transported through the pipeline systems of others into or through Louisiana, in various streams in interstate commerce, for sale for resale under rate schedules or tariffs approved by and on file with FERC, to gas distribution companies, municipalities, and other pipeline companies, and/or for direct sale to other customers, all under certificates of public convenience and necessity issued by FERC.

Natural gas produced from the outer continental shelf ("OCS") or onshore federal enclaves is not subject to the imposition of a severance tax or other tax upon the volume of production by any state or territory of the United States,

nor is it subject to the imposition of an import tax or tariff by the United States. However, a severance tax is paid on gas produced in Louisiana, La. R.S. 47:631, *et seq.*, and in neighboring states from which gas may be transported through Louisiana. See *e.g.*, Tex. Tax. — Gen. Ann. art. 3.01 (Vernon. 1960); Miss. Code 1942 §§9417.5-01, *et seq.*

The First Use Tax therefore applies only to gas produced from the OCS or onshore federal enclaves with the vast majority of this gas originating from the OCS. This gas is dedicated to interstate commerce from the moment of production. The pipeline companies transport virtually all of the gas subject to the First Use Tax into and through other states. The aspects of this transportation through other states are as easily described as "uses" (as defined in the Louisiana statute), as are the aspects of the transportation into or through Louisiana.

The First Use Tax and its companion statutes clearly show that the First Use Tax is aimed squarely at gas produced from federal domains and destined for ultimate consumption by persons in other states, and is designed so that the economic burden of the tax falls exclusively on the pipeline companies and on consumers in other states. If upheld, it will cost the pipeline companies and their customers an estimated 275 million dollars annually.

SUMMARY OF ARGUMENT

I. THE FIRST USE TAX IS VOID UNDER THE SUPREMACY CLAUSE

A. The First Use Tax Invades the Exclusive Jurisdiction of the Federal Energy Regulatory Commission Under the Natural Gas Act

When Congress enacted the NGA, it created a "complete, permanent and effective bond of protection" for the natural gas consumer. *Atlantic Refining Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 388 (1959). To achieve this objective, Congress created the Federal Power Commission, now FERC, and vested that body with exclusive jurisdiction over the sales for resale by, and services and facilities of, natural gas companies selling and transporting natural gas in interstate commerce. *Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 516 (1947). To the extent Congress has exercised its power to regulate the sale and transportation of natural gas in interstate commerce, it has preempted state regulation of these areas. *Northern Natural Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84 (1963).

The First Use Tax is void under the Supremacy Clause because it interferes with the Commission's paramount authority to regulate the sales and service of natural gas companies subject to its jurisdiction.

By providing for the nullification of material pricing provisions in contracts between natural gas pipeline com-

panies and their producer-suppliers, under which the Commission has previously authorized, or may authorize, service to the public as being required by the public convenience and necessity, the First Use Tax interferes with the Commission's administration and enforcement of contracts subject to its jurisdiction, and adversely affects its ability to set just and reasonable rates for sales and services provided by the consumer. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

Despite its characterization, it is clear that the First Use Tax is a charge or rate on the transportation of natural gas from federal domains into and through Louisiana. Just as a state may not directly set minimum rates for wellhead sales of natural gas, *Natural Gas Pipe Line Co. of America v. Panoma Corp.*, 349 U.S. 44 (1955), *Cities Service Gas Co. v. State Corp. Comm'n of Kan.*, 355 U.S. 391 (1958), it also may not establish, directly or indirectly, a rate or charge on the transportation of natural gas in interstate commerce. Clearly, the establishment of such rates or charges interferes with the Commission's jurisdiction to set just and reasonable rates for the customers served by the pipeline companies.

The regulatory aspects of the First Use Tax permeate the statute and usurp the exclusive jurisdiction of FERC to assure just and reasonable rates for the transportation and sale of natural gas in interstate commerce. The interstate transportation of natural gas is an area in which federal regulation is so pervasive, and the federal interest so dominant, that the First Use Tax must be deemed invalid simply because it infringes upon the area, even absent

consideration of its many demonstrable conflicts with the regulatory authority of FERC. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

B. The First Use Tax Conflicts With the Outer Continental Shelf Lands Act And the Coastal Zone Management Act

The OCSLA prohibits the application of state taxation laws to the OCS, 43 U.S.C. 1333(a)(2)(A), and provides that no state shall have "any interest in . . . the property and natural resources [of] . . . or the revenues [from]" the OCS, 43 U.S.C. 1333(a)(3). The legislative history of the OCSLA shows that Louisiana and other coastal states sought authorization to tax the resources of, and participate in the revenues from, the OCS, but that Congress made a conscious decision to the contrary. The structure of the First Use Tax makes clear its purpose to tax the natural gas of the OCS and to participate in the revenues derived from OCS development, and the tax is accordingly proscribed by the Supremacy Clause.

The OCSLA Amendments of 1978 and the CZMA represent a comprehensive statutory scheme designed to promote OCS activities in conjunction with sound principles of coastal zone management. To encourage OCS development and to provide reasonable compensation to states for OCS impacts, Congress established a coastal energy impact fund ("CEIF"), which was intended to be the sole source of OCS derived financial support for coastal states. The First Use Tax undermines the comprehensive scheme of coordinating coastal energy and environmental

concerns. If it is not declared invalid, Louisiana will obtain indirectly that which Congress specifically has forbidden, *i.e.*, an unfettered share in OCS derived funds.

II. THE FIRST USE TAX VIOLATES THE COMMERCE CLAUSE

A. The First Use Tax Is Unapportioned And Creates The Risk Of Multiple Taxation.

The First Use Tax is imposed on the total volume of natural gas moving in interstate commerce and is thus unapportioned. Virtually all of the gas subject to the tax is ultimately consumed in states other than Louisiana. Because Louisiana measures the tax by the total volume of gas subjected to "uses" in that state, and because many of these "uses" are repeated in other states, those states would have the power to impose an identical tax on the same volume of gas. The First Use Tax accordingly creates a substantial risk of multiple taxation. *Michigan Wisconsin Pipe Line Company v. Calvert*, 347 U.S. 157 (1954); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939). Because the First Use Tax is unapportioned, the proper test for determining its constitutionality is whether it creates the risk of multiple taxation, not whether such taxation actually exists. *Central Railroad v. Pennsylvania*, 370 U.S. 607 (1962); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938).

B. The First Use Tax Discriminates Against Interstate Commerce

The First Use Tax burdens only natural gas produced

from the OCS or onshore federal enclaves. Because there is no valid reason to treat such gas differently from gas produced in Louisiana, the First Use Tax discriminates against interstate commerce. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Sonneborn Bros. v. Cureton*, 262 U.S. 506 (1923).

The First Use Tax, in combination with the Severance Tax Credit, permits First Use Tax taxpayers who also produce natural resources in Louisiana, a dollar-for-dollar credit for First Use taxes paid against their severance tax liability. The First Use Tax thus discriminates against the interstate commerce conducted by those taxpayers (the pipeline companies) which do not produce natural resources in the state. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977).

The First Use Tax, in conjunction with the Tax Credit for Electric and Natural Gas Service, and various exemptions for in-state uses of natural gas, is designed to impose the entire economic burden of the tax on the pipeline companies and their out-of-state consumers. Louisiana has thereby singled out interstate commerce for tax treatment not shared by its own residents. The First Use Tax is accordingly unconstitutional. *Nippert v. City of Richmond*, 327 U.S. 416 (1946); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963).

ARGUMENT

I.

THE FIRST USE TAX IS VOID UNDER THE SUPREMACY CLAUSE

The Supremacy Clause provides that the constitution and all laws made pursuant to it shall be the supreme law of the land. State laws which interfere with, frustrate the full effectiveness of, or are contrary to federal regulatory measures cannot be permitted to stand. *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946); *Pub. Util. Comm'n of Cal. v. United States*, 355 U.S. 534 (1958); *Free v. Bland*, 369 U.S. 663 (1962); *Nash v. Florida Indus. Comm'n*, 389 U.S. 235 (1967); *Perez v. Campbell*, 402 U.S. 637 (1971); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Arizona Public Service Co. v. Snead*, ___ U.S. ___, 60 L. Ed 2d 106, 99 S.Ct. 1629 (1979).

A. THE FIRST USE TAX INVADES THE EXCLUSIVE JURISDICTION OF THE FEDERAL ENERGY REGULATORY COMMISSION UNDER THE NATURAL GAS ACT.

To provide a "complete, permanent and effective bond of protection" for the natural gas consumer, *Atlantic Refining Co. v. Pub. Serv. Comm'n of N. Y.*, 360 U.S. 378, 388, Congress declared in Section 1(a) of the NGA, that the "business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal Regulation in matters relating to

the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." Congress, therefore, preempted the areas covered by the NGA for regulation by FERC to the exclusion of the states. The First Use Tax patently infringes upon that preemption in violation of the Supremacy Clause.

1. Congress Has Preempted the Areas Covered By the Natural Gas Act

Section 1(b) of the NGA vests jurisdiction in the Commission over: (1) the transportation of natural gas in interstate commerce; (2) the sale of that gas for resale in interstate commerce; and (3) natural gas companies engaged in such transportation or sale. *Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 516 (1947); *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 636 (1972). In vesting the Commission with such jurisdiction, Congress was undertaking to fill the gap disclosed by the Court's decisions that the states had no authority as a constitutional matter to regulate wholesale sales in interstate commerce since they were a matter of national, not local, concern. *See, e.g., Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298 (1924); *Pub. Util. Comm'n of Rhode Island v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). *Cf. FPC v. East Ohio Gas Co.*, 338 U.S. 464, 469-74 (1950).

In furtherance of the Commission's regulation over sales for resale, Section 4(a) of the NGA provides in part:

> All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transporation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

Likewise, Section 5(a) of the NGA complements Section 4 by vesting authority in the Commission, *inter alia,* to investigate all such jurisdictional rates and to establish the appropriate rates upon a finding after hearing that the existing rates are unjust, unreasonable, unduly discriminatory, or preferential. *See e.g., United Gas Pipe Line Co. v. Mobile Gas Service Corp.,* 350 U.S. 332 (1956).

Congress also vested the Commission with jurisdiction over the initiation and termination of interstate transportation and/or sales for resale. Sections 7(c) and (e) of the NGA require the issuance by the Commission of a certificate of public convenience and necessity as a condition to any undertaking by a natural gas company to make new sales for resale or to provide new transportation service. Section 7(b) of the NGA prohibits a natural gas company from discontinuing or abandoning an existing sale for resale or transportation service without Commission approval. In sum, the Commission has been given comprehensive and exclusive regulatory jurisdiction over the sales, services and facilities of natural gas companies transporting and selling natural gas in interstate commerce.

The Court has repeatedly made clear that Congress has preempted the field covered by the NGA to the exclusion of the states. *See, e.g., Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co.*, 314 U.S. 498, 506-509 (1942); *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972). The Court's decisions in *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179 (1950) and *Natural Gas Pipeline Co. of America v. Panoma Corp.*, 349 U.S. 44 (1955), graphically illustrate the history, development and broad scope of federal preemption of the sale and transportation of natural gas in interstate commerce. In particular, they demonstrate that the area preempted by the NGA is much broader than that which was previously immune from state regulation under the Commerce Clause.

In *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, the Court considered the validity of state orders setting minimum wellhead prices on gas sold in interstate commerce, and sustained the state's action as a constitutional matter under the Commerce Clause; it specifically noted, however, that it had not considered any question of conflict with the NGA:

> Whether the Gas Act authorizes the Power Commission to set field prices on sales by independent producers, or leaves that factor to the states is not before this Court. 340 U.S. 179, 188-89.

The Court answered this question in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), and held that the NGA required the Commission to set wellhead prices for gas sold in interstate commerce. In the *Natural*

Gas Pipeline case, the Court next considered the validity of a state minimum wellhead price order for gas sold in interstate commerce. However, this time the Court dealt with the matter interms of such order's conflict with the NGA, in light of its decision in *Phillips Petroleum.*

In *Natural Gas Pipeline,* the state court had sustained the state's order as within this Court's earlier holdings. However, on appeal, this Court set the minimum price order aside, observing in a *per curiam* opinion that *Phillips* had established the Commission's jurisdiction over wellhead prices to the exclusion of the states, and that *Peerless* was inapplicable since it dealt only "with constitutional questions and not the construction of the Natural Gas Act." 349 U.S. 44, 45. *See also Cities Service Gas Co. v. State Corp. Comm'n of Kan.,* 355 U.S. 391 (1958).

The Court elaborated on the Commission's plenary jurisdiction in *Northern Natural Gas Co. v. State Corp. Comm'n of Kan.,* 372 U.S. 84 (1963), in which it held that an order of the Kansas Commission requiring pipeline companies to purchase gas ratably from local wells, improperly invaded the FPC's exclusive jurisdiction even though, as Kansas argued, the order did not involve the pricing of gas:

> *The federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas . . .* [or] *for state regulations which would indirectly achieve the same result.* These state orders necessarily deal with matters which directly affect the ability of the Federal Power Commission to regulate comprehensively and effectively the

transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act. They therefore invalidly invade the federal agency's exclusive domain. (Citations and footnotes omitted)[1]

* * *

The danger of interference with the federal regulatory scheme arises because these orders are unmistakably and unambiguously directed at *purchasers* who take gas in Kansas for resale after transportation in interstate commerce. . . Moreover, any readjustment of purchasing pattern which such orders might require of purchasers who previously took unratably could seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States. This relationship is a matter with respect to which Congress has given the Federal Power Commission paramount and exclusive authority. (Citations omitted, italics in original) 372 U.S. 84, 91-92.

The Court also rejected the state's principal contention that ratable taking was essential for the conservation of natural gas, and that conservation was a function of state power, declaring:

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[1] Emphasis supplied throughout unless otherwise noted.

> There is no doubt that the States do possess power to allocate and conserve scarce natural resources upon and beneath their lands. We have recognized such power with particular respect to natural gas. . . . But the problem of this case is not as to the existence or even the scope of a State's power to conserve its natural resources; the problem is only whether the Constitution sanctions the particular means chosen by Kansas to exercise the conceded power if those means threaten effectuation of the federal regulatory scheme.
>
> * * *
>
> [O]ur cases have consistently recognized a significant distinction, which bears directly upon the constitutional consequences, between conservation measures aimed directly at interstate purchasers and wholesalers for resale, and those aimed at producers and production. The former cannot be sustained when they threaten, as here, the achievement of the comprehensive scheme of federal regulation. *Id.* at 93-4.

More recently, the Court affirmed, *per curiam,* the holding of a three-judge court setting aside orders of the Oklahoma Corporation Commission which had prohibited the sale of gas below specified prices. *See Oklahoma Corp. Comm'n v. FPC,* 415 U.S. 961 (1974), *aff'g FPC v. Oklahoma Corp. Comm'n,* 362 F. Supp. 522 (W.D. Okla. 1973). The district court had held that the orders constituted an indirect attempt to fix rates for interstate sales and

thereby conflicted with the Commission's exclusive regulatory authority to set just and reasonable rates for such sales.

These decisions make clear that when the First Use Tax is examined in the context of the NGA and the Commission's broad responsibility under that statute to so regulate as to protect the natural gas consumer, it patently infringes upon the Commission's exclusive jurisdiction.

2. The First Use Tax Interferes With The Commission's Regulatory Authority Over Natural Gas Contracts

Under Sections 4, 5 and 7 of the NGA, the Commission has regulatory authority over contracts for the sale and transportation of natural gas in interstate commerce.

In *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), the Court emphasized the critical importance of the Commission's regulation of contracts under the NGA:

> The Natural Gas Act permits the relations between the parties to be established initially by contract, *the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public.* 350 U.S. 332, 338-39.

Accordingly, the Court concluded that contracts subject to the Commission's jurisdiction under the NGA "remain fully

subject to the *paramount power* of the Commission to modify them when necessary in the public interest." *Id.* at 344.

Mobile Gas Service Corp. recognizes that Sections 4 and 5 of the NGA charge the Commission with the responsibility to assure that such contracts, as well as rates for the transportation and sale of natural gas, are just and reasonable, and that these sections require an appropriate filing with the Commission of any changes in previously filed contracts or rates. 350 U.S. 332, 341. Further, *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), holds that these provisions require that the services provided by natural gas companies subject to Commission jurisdiction be nondiscriminatory. These holdings make clear the Commission's paramount authority under the NGA over contracts subject to its jurisdiction. Changes to the pertinent provisions of a contract, particularly those relating to rates and services, may not be made effective without prior notice to and approval by the Commission.

The NGA prohibits the commencement of service under contracts subject to Commission jurisdiction without prior Commission approval under Section 7. Once Commission-approved service commences, it may not be changed or terminated without prior approval of the Commission under Section 7(b).[2] In *FPC v. Louisiana Power & Light Co.*, the Court stressed the importance of

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[2] By providing drastic penalties for non payment of the tax for any reason, *i.e.*, "seizure and sale" of the gas, the First Use Tax may interfere with the Commission's statutory authority with respect to abandonment of service.

uniform national control over such service. See also *California v. Southland Royalty Co.*, 436 U.S. 519, 524 (1978), underscoring the Commission's authority to control the terms of service to the interstate market.

The First Use Tax clearly interferes with the Commission's authority under the NGA by altering and prohibiting certain material pricing provisions in contracts for the sale of natural gas subject to the Commission's jurisdiction.

Section 1303C of the First Use Tax provides in pertinent part that:

> Any agreement or contract by which an owner of natural gas at the time a taxable use first occurs claims a right to reimbursement or refund of such taxes from any other party in interest, other than a purchaser of such natural gas, is hereby declared to be against public policy and unenforceable to that extent.

This Section impermissibly interferes with FERC's regulatory functions by undertaking to nullify any provision of contracts between pipeline companies and their suppliers for tax reimbursement by the supplier, even though any such contract would have been previously accepted and approved by the Commission as being required by the public convenience and necessity. As pointed out by the Commission:

> Many of these contracts have been incorporated into certificates of public convenience and necessity issued by this Commission and the Federal Power Commission . . . [M]any existing sales of natural gas, which are subject to the First Use Tax, remain subject to the regulatory structure of the Natural Gas Act, which provides in Section 7, 15 U.S.C. §717f, that the contracts and certificates for such sales may not be amended without prior Commission approval. Furthermore, under the NGPA [Natural Gas Policy Act of 1978], the Commission has the authority to determine whether costs of processing natural gas to remove liquids may be recovered from the purchasers of the processed gas and passed on to consumers. NPGA §110(a)(2). Order No. 10-B at 8-10; 43 Fed. Reg. 13460, 13462, n. 16, March 12, 1979.

Thus, the First Use Tax, if permitted to stand, would undercut and alter, without Commission approval, contract and federal certificate rights and obligations between pipeline companies and their suppliers, despite the Commission's conclusion that any such contracts are just and reasonable and the services thereunder are required by the public convenience and necessity. By providing for the nullification of the terms and provisions of such contracts, the First Use Tax usurps the Commission's regulatory role and, indeed, destroys the very foundation on which the Commission's regulation is based. As recognized in *Northern Natural,* 372 U.S. 84, 92, such a result would "seriously impair the Federal Commission's authority to

regulate the intricate relationship between the purchasers' cost structure and eventual costs to wholesale customers who sell to consumers in other states."

Equally notable, as the Commission has recognized, the First Use Tax would also interfere with the Commission's jurisdiction under Section 110(a)(2) of the NGPA. That Section empowers the Commission by "rule or order" to allow a seller of natural gas to recover from the purchaser of such natural gas "any costs of . . . processing, treating, . . . or transporting . . . natural gas . . . borne by the seller. . . ." The Commission stated in its Order No. 10-B that the First Use Tax interferes with this authority. By nullifying material pricing provisions in contracts between pipeline companies and their suppliers, whereby sellers may have agreed to bear these costs, and by forcing the pipeline companies and their customers to incur the costs associated with the asserted "uses" of processing, treating and transportation, the Commission is deprived of its authority to determine whether to allow these costs in the prices charged by sellers for their gas.

3. The First Use Tax Imposes a Rate or Charge For the Transportation Of Natural Gas In Interstate Commerce Which Unconstitutionally Interferes With the Commission's Paramount Responsibility To Assure Just And Reasonable Rates and Services

Through the First Use Tax, Louisiana attempts to mandate the terms and conditions of interstate transportation of natural gas in and through Louisiana. When

Congress enacted the NGA, it "occupied the field" of transportation of natural gas in interstate commerce to the exclusion of the states, *Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 519, and charged the Commission with paramount responsibility for regulating that activity in terms of rates and services. A state can no more validly establish a rate for the transportation of natural gas in interstate commerce than it can set minimum prices for wellhead sales of natural gas or indirectly affect such prices through the vehicle of ratable take orders. *Natural Gas Pipeline Co. of America v. Panoma Corp.; Cities Service Gas Co. v. State Corp. Comm'n of Kansas; Oklahoma Corp. Comm'n v. FPC.* Such activity interferes with the Commission's paramount and exclusive jurisdiction to regulate the rates and charges for the transportation of natural gas in interstate commerce and to protect the interest of the ultimate consumer.

Despite its characterization as a "tax," it is clear that the practical effect of the First Use Tax is to impose a rate or charge on the transportation of natural gas in interstate commerce into or through Louisiana. Clear and dispositive proof of this conclusion may be obtained from an analysis of the provisions of the statute.

First, the statute has been carefully crafted to limit its applicability to gas produced from federal domains. Such gas is principally produced from the OCS, but also includes certain volumes of gas produced from onshore federal enclaves. By its very nature this gas is dedicated to interstate commerce from the moment of its production. *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); 15 U.S.C.

3301(18). The limitation of the tax to gas produced from federal domains results because Section 1303A limits the applicability of the statute to "natural gas upon which no severance tax or tax upon the volume of production has been paid, or is legally due to be paid, to [Louisiana] or any other state or territory of the United States, or which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country." Likewise, Section 1301C defines "one of [the] express purposes of [the] tax" as being "the exaction of . . . compensation for . . . costs which . . . enure solely to the benefit of owners of natural gas produced *beyond* the boundaries of Louisiana." Since Louisiana and other gas producing states have severance taxes, or their like, and since this gas is exempted from the reach of the First Use Tax, the tax is, in fact, a charge upon gas produced from federal territory and transported into or through Louisiana.

Second, it is clear that the drafters of the First Use Tax sought to create the impression that the levy would be upon "uses" of the gas within Louisiana, and not upon the transportation of such gas in interstate commerce. However, in so doing, the Louisiana Legislature, as did the Texas Legislature in *Michigan Wisconsin Pipe Line Co. v. Calvert,* took refuge in a "beggared definition."

Thus, "use" as defined by the statute, does not involve consumption. Indeed, when the gas is actually used or consumed within Louisiana, such use is exempted from the reach of the First Use Tax. For example, Section 1303A provides in pertinent part:

> The tax levied herein shall not apply to natural gas otherwise subject thereto when such gas is used or consumed in the drilling for or production of oil, natural gas, sulphur, or in the processing of natural gas for liquids extraction within the state; nor shall it apply to gas shrinkage volumes attributable to the extraction of ethane, propane, butanes, natural or casinghead gasoline or other liquefied hydrocarbons, provided shrinkage volumes shall not exceed equivalent gas volumes of the extracted liquids computed by recognized conversion factors used by the Gas Processors Association nor shall it apply to natural gas used or consumed in the manufacture of fertilizer and anhydrous ammonia within the state.

The "use" defined by the First Use Tax is a highly artificial concept. Section 1302(8) defines "use" as:

> [1] the sale; [2] the transportation in [Louisiana] to the point of delivery at the inlet of any processing plant; [3] the transportation in [Louisiana] of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; [4] transfer of possession or relinquishment of control at a delivery point in [Louisiana]; [5] processing for the extraction of liquefiable component products or waste materials; [6] use in manufacturing; [7] treatment; [8] or other ascertainable action at a point within the state.

These statutory "uses" do no more than locate the point in time at which the tax will apply to the gas or its

transportation, and assist in identifying the taxpayer. What the statute defines as "uses" necessarily relate only to the ownership or transportation of the gas. Thus, Section 1302(9) defines the taxpaying owner as the person with title to the gas "at the time a use occurs," but excludes "any person to whom temporary possession and control has [at the time a "use" occurs in the State] been transferred." However, the tax is imposed on an owner who is merely "allowing the performance" of a "use" within the state. This results in the anomaly that an owner may be liable for the tax even though he has no contact whatsoever with the "use" in question. Section 1303E.

The first four "uses" defined in Section 1302(8) relate to the sale, the transfer of possession, or certain aspects of the transportation of gas within Louisiana. Patently, such "uses" on their face do not involve any use of the gas within Louisiana affecting the continuity of the intersate journey through that state. Nor do they involve any substantial economic factor justifying the finding of "separate local activity." *Cf. Michigan Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 169.

The two "uses" defined in Sections 1302(8) [2] and [3] involve "transportation" of natural gas in interstate commerce, since the transportation of natural gas to the point of delivery at the inlet of any processing plant and the transportation of any unprocessed natural gas to the point of delivery of any measurement or storage facility do not affect the continuity of the interstate journey of the gas. *Compare Michigan Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 166-67 (incidence of tax on activity *subsequent to* introduction of gas in interstate commerce, rendering tax invalid).

The sale of natural gas, defined in Section 1302(7) as "the transfer of ownership of and title to natural gas from one person to another for valuable consideration" and made a "use" by Section 1302(8)[1], does not interrupt the transportation of the gas in interstate commerce. *East Ohio Gas Co. v. Tax Comm'n of Ohio,* 283 U.S. 465 (1931). Nor does the transfer of possession or relinquishment of control, made a "use" by Section 1302(8)[4], remove the gas from transportation in interstate commerce. *Id.* Indeed, the sale, exchange and transportation of natural gas are all subject to the Commission's jurisdiction under Section 7 of the NGA.

Processing, made a "use" by Section 1302(8)[5], is directly intertwined with the transportation of the gas in interstate commerce and does not interrupt its continuous flow. *Deep South Oil Co. of Texas v. FPC,* 247 F.2d 882 (5th. Cir. 1957). Moreover, careful scrutiny of the statute belies the assertion that the tax is imposed on "processing." The tax is imposed on the owner, La. R.S. 47:1305A and 1303C, rather than the processor or user of the gas. The amount of the tax is not related in any way to the rate, measure, amount, economic value or any other measurable aspects of processing distinct from transportation itself. Rather, the total volume of the gas which flows continuously through processing is taxed. Section 1303A, B. The volume of gas actually consumed in processing is exempted from the tax. Section 1303A. The tax affects only the owner, even if he merely transports the gas and "allow[s] the performance" of processing. Section 1303E. The statute precludes the owner (the pipeline companies) from shifting the tax to the actual processor. Section 1303C. The tax is therefore not actually upon processing, but in reality is upon the gas or the transportation "at the time of [processing]." Section 1302(9).

Many of these same considerations apply to "use in manufacturing," made a "use" by Section 1302(8)[6], and "treatment," made a "use" by Section 1302(8)[7]. Additionally, two significant manufacturing uses, consumption in the manufacture of fertilizer and anhydrous ammonia, are exempt from the tax. Section 1303A. Louisiana consumers who actually use the gas in manufacturing or otherwise are given a tax credit for increased costs due to the First Use Tax. *See* pp. 78-81, *infra.* Thus, the burden of the tax is borne solely by those engaged in the transportation of the gas in interstate commerce, and by the ultimate consumers of the gas in other states. Finally, "treatment," and "other ascertainable action" (made a "use" by Section 1302 (8)[8]), are so patently vague as to be constitutionally impermissible on that basis alone.

In sum, the incidence of the First Use Tax is upon gas moving in, and constituting an integral part of, interstate commerce into, within or through Louisiana.

Third, the regulatory effect of the statute requires the tremendous costs incurred by the pipeline companies in paying the tax to be passed on to the ultimate consumers. Indicative of the magnitude of such enormous costs is the fact that the pipeline companies will be required to pay Louisiana well in excess of one quarter of a billion dollars annually.

The statute clearly intends that the full brunt of the tax be shouldered by ultimate consumers by forcing increases in the prices paid by them for the gas produced from federal domains. Section 1303C expressly provides:

> this tax shall be deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas.

Since it is a well-established principle of public utility law that taxes validly incurred constitute a cost to be recovered under the cost-of-service method used by the Commission in fixing rates for natural gas pipeline companies, it is obvious that the effect, as well as the design, of the above provision is for the First Use Tax to be passed on to the purchasers of the gas, and thereby have a direct impact — by at least the amount of such tax — upon the prices to be paid by ultimate purchasers and consumers of the gas.[3] *Mississippi River Fuel Corp. v. FPC,* 163 F.2d 433 (D.C. Cir. 1947); *Galveston Electric Co. v. City of Galveston,* 258 U.S. 388 (1922).

The same effect, and design, is also evident from the further provision of the same Section 1303C proscribing as against the public interest and unenforceable:

> Any agreement or contract by which an owner of natural gas . . . claims a right to reimbursement or refund of such taxes from any other party in interest other than a purchaser of such natural gas.

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[3]There is no question that the Commission has so construed the effect of the tax. See the Commission's Order No. 10, 43 Fed. Reg. 45553 (Oct. 3, 1978), Order No. 10-A, 43 Fed. Reg. 60438 (Dec. 28, 1978), Order No. 10-B, 43 Fed. Reg. 13460 (March 12, 1979), 44 Fed Reg. 21330 (April 10, 1979) and 44 Fed. Reg. 46291 (Aug. 7, 1979).

By undertaking to prevent the pipeline companies from enforcing contractual provisions for refund or reimbursement against others than the purchaser of the gas, the Louisiana Legislature would leave them no choice as a practical matter but to look to the rates charged their customers as the source of reimbursement or recovery of the tax.

This clearly regulatory feature of the statute — the assurance that consumers would bear the full brunt of the tax — was deemed by Louisiana's Legislature to be of such crucial and overriding importance, that it also provided, in Section 4 of the statute, that in the event of a final judicial determination "upholding the right of an owner [of natural gas] to enforce a contract or agreement otherwise rendered unenforceable by Section 1303C," then, depending on whether the contractual-reimbursement provision is couched in terms of taxes or costs incurred by the owner, no tax shall be due on the affected gas, or the entire statute "shall be null and void." It is thus established that this regulatory aspect of the tax was considered by the Legislature to be paramount, and that the levy of the tax is secondary to the assignment of its burden.

The First Use Tax is nothing more than Louisiana's rate or charge for the transportation of natural gas produced from federal domains in interstate commerce across its borders. The states are prohibited from setting such rates and charges. By virtue of the NGA, Congress has preempted the areas of transportation and sale of natural gas in interstate commerce and has charged the Commission with exclusive responsibility for establishing just and reasonable rates for these activities.

There is no practical difference between the First Use Tax and the minimum price orders set aside in *Natural Gas Pipeline Co. of America v. Panoma Corp., Cities Service Gas Co. v. State Corp. Comm'n of Kan.* and *Oklahoma Corp. Comm'n v. FPC.*[4] In the minimum price cases, the states attempted to set minimum rates for wellhead sales of natural gas in interstate commerce. Here, Louisiana, under the guise of a tax, has imposed a rate or charge for the transportation of natural gas, produced from federal domains, into and through the state, and has designed it so as to force its imposition on consumers in other states. In the minimum price cases, the Court held such state measures unconstitutional because they interfered with the Commission's exclusive jurisdiction to set just and reasonable rates for wellhead sales of natural gas in interstate commerce. Louisiana's tax is equally unconstitutional because it attempts to set rates for the transportation of natural gas across its boundaries and invades the Commission's exclusive jurisdiction over the rates charged for the sale and transportation of natural gas in interstate commerce.

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[4]The district court in *Oklahoma Corp. Comm'n* placed considerable emphasis on the fact that the orders involved an increase of more than $30,000,000 annually in the rates paid by the ultimate consumers (362 F. Supp. 522, 533). This is to be compared with the increase of nearly ten times that much which would result under the First Use Tax.

Even assuming, *arguendo,* that the First Use Tax is only an indirect interference with the Commission's exclusive rate-making responsibility, it is nonetheless invalid under the holding in *Northern Natural:*

> The federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas ... or for state regulations which would indirectly achieve the same result." 372 U.S. 84, 91.

In addition, and equally important for present purposes, *Northern Natural* holds that the state order there involved constituted such an improper invasion because it potentially interfered with the Commission's discharge of its "authority to regulate the intricate relationship between the purchasers and the eventual costs . . . to consumers in other states." *Id.* at 92. Since the First Use Tax directly affects the costs includable in the cost-of-service used by the Commission in the discharge of its ratemaking responsibility, the tax plainly results in a far more direct interference with the relationships subject to the Commission's regulation than did the ratable take order rejected in *Northern Natural.*

B. THE FIRST USE TAX CONFLICTS WITH THE OUTER CONTINENTAL SHELF LANDS ACT AND THE COASTAL ZONE MANAGEMENT ACT.

A state statute will be declared unconstitutional under the Supremacy Clause if, among other things, it conflicts

with a valid federal statute. Such a conflict will be found when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941); *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 158 (1978).

By its terms, the First Use Tax applies primarily to gas produced from the OCS. By taxing such gas, the First Use Tax conflicts with, and prevents accomplishment of the full purposes of, the express prohibitions in the OCSLA against state taxation of such gas and, therefore, cannot stand under the Supremacy Clause. The OCSLA and CZMA, and their legislative histories, clearly establish that the states are prohibited from taxing OCS gas and that the CEIF program established by the CZMA is the sole means for compensating states for the effects of OCS activities.

1. The Outer Continental Shelf Lands Act Prohibits State Taxation Of Outer Continental Shelf Gas

Section 4(a)(2) of the OCSLA, 43 U.S.C. 1333(a)(2)(A), which adopts state laws to the extent that they are applicable and not inconsistent with federal laws, concludes by providing:

> State taxation laws shall not apply to the outer Continental Shelf.

Section 4(a)(3) of the OCSLA, 43 U.S.C. 1333(a)(3), similarly provides:

> (3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

These provisions, taken either separately or together, clearly manifest a Congressional intent to prohibit state taxation of OCS gas such as that sought to be imposed by the First Use Tax.

This Congressional intent is equally evident from the Act's legislative history,[5] which shows that Congress considered and rejected efforts by the coastal states, notably Texas and Louisiana, to share in the revenues from and to impose taxes on OCS gas production. Louisiana's effort by the First Use Tax to obtain "some measure of reimbursement . . . for damages [alleged to be] a direct consequence of activity within the state associated with such natural gas by the owners thereof," Section 1301C, in effect seeks revenues from OCS gas expressly denied by Congress.

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[5] When called on to decide whether a state law conflicts with a federal statute, this Court has invariably looked to the legislative history of the federal statute to determine the Congressional purpose in enacting it. Such an inquiry is certainly appropriate here regarding the OCSLA's provisions prohibiting application of state taxation laws to, or state claims to the resources and revenues from, the OCS. *See, e.g., Arizona Public Service Co. v. Snead*, ___ U.S. ___, 99 S.Ct. 1629 (1979); *New York Tel. Co. v. New York Dept. of Labor*, ___ U.S. ___, 99 S.Ct. 1328 (1979); *Malone v. White Motor Corp.*, 435 U.S. 497 (1978).

Representatives of coastal states testifying at the extensive hearings before the Senate Committee repeatedly urged that the proposed legislation authorize their states to tax the production of OCS gas or to share in the revenues derived therefrom, to compensate them for expenses resulting from OCS activity. Hearings before the Senate Committee on Interior and Insular Affairs on S. 1901 (Outer Continental Shelf), 83rd Cong., 1st Sess. ("Hearings"). For example, in its prepared statement, the Texas School Land Board, comprised of the Governor, the Attorney General of Texas, and the Commissioner of the General Land Office of Texas, testified that:

> Along with the right of the States to share in the leasing of and revenues from this area we think it is imperative that any legislation passed with respect to this area should also provide for the extension of the police power of each coastal State to that portion of the Continental Shelf within the State boundaries or which would be within the boundaries of such State if extended seaward to the outer edge of the Continental Shelf. This police power should include, among other things, the power of taxation, conservation, and control of the manner of conducting geophysical operations. Hearings, pp. 185-6.
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> * * *
>
> We do not believe that Texas and the other coastal States should be treated as 'stepchildren' merely because this area is within or contiguous to their borders by being required to bear the entire

> expense of providing and maintaining the onshore public facilities, such as highways, ports, etc., necessary for the successful prosecution of offshore drilling operations. Instead, we believe that these States should be assisted in this by being allotted a share of the revenues derived from the leasing of oil, gas, and other minerals in this area . . . The extension of the taxing power of the coastal States to this area would yield additional moneys to these States for use in the construction and maintenance of onshore facilities and in providing for the enforcement of the police powers and conservation measures of the States in the Continental Shelf area. Id. *187-8.*

See also Hearings, pp. 191-3 (colloquy between Senator Daniel of Texas and Attorney General Shepperd of Texas).

The testimony of Louisiana's Attorney General was to the same effect:

> As time goes on thousands of workmen in the outer Continental Shelf will bring their families with them to Louisiana. Placing wives and children in comfortable homes, if available, and in adjusting them to Louisiana's benevolences will be the first thought of the workmen in this area.
>
> Oil companies will use our highways and roads to transport heavy machinery and equipment to supply bases.

> This will materially increase the cost of construction and maintenance of thoroughfares, particularly in marsh territory where road and bridge building and maintenance involve costs which stagger the imagination. Louisiana excels in charity hospitals and free hospitalization. Families of workmen and the workmen themselves will use those facilities. Such hospitals are not going to inquire into the impecunious circumstances of workmen and their families when accidents occur, immediate medical care is essential, and the saving of precious lives is necessary.
>
> * * *
>
> Substantial increases in the number of school children will impose a tremendous burden on our school system and the State finances. Hearing, pp. 265-6.

In light thereof, Louisiana's Attorney General urged:

> If we are deprived of severance taxes in the outer Continental Shelf, which normally would serve this financial need, we must either draw upon the revenue derived from severance taxes imposed in all areas within the States [sic] boundaries, or look for other sources of revenue.
>
> * * *

> Assuming that the committee will appreciate the aforementioned problems of the contributing States, we can only suggest three possible solutions: (1) Authorization to the several States to levy severance taxes in such areas; (2) a reasonable share in the proceeds from leases and production; or (3) the payment of a definite sum of money periodically. *Id.* at 266.[6]

The legislative history of the OCSLA further clarifies that, despite these efforts by the coastal states, Congress not only declined to permit them to share in OCS revenues or tax OCS resources, but undertook affirmatively to proscribe such actions.

H.R. 5134, the bill proposed by the House Committee, provided generally for the application of state laws to the OCS to the extent consistent with applicable federal law, but flatly and unequivocally prohibited the application of state taxation laws. Section 9 contains this explicit priviso:

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[6]*See also* Minority Report of Louisiana's Senator Long, S. Rep. No. 411, 83rd Cong., 1st Sess., p. 65, and comments of Texas Senator Daniel, 99 Cong. Rec. 7131-2, who argued:

> "Mr. President, I believe that any revenues derived from the Continental Shelf adjacent to coastal States should be divided, at least to some extent, with the coastal States. The coastal States need revenues with which to carry on their services to companies and to individuals who reside on shore but work on the outer Continental Shelf. . . .
>
> "I believe that in all fairness the States should receive some percentage of the revenues, or at least have the right to tax the private lessees who operate on the outer Continental Shelf."

> *Provided however* that state taxation laws shall not apply in such areas of the outer continental shelf.

H. Rep. No. 413, 1953 U.S. Code Cong. & Ad. News 2177, submitted by the House Judiciary Committee, elaborated upon these provisions as follows:

> Section 9(a) constitutes a legislative confirmation of the jurisdiction of the United States over the natural resources of the subsoil and seabed of the outer Continental Shelf outside State boundaries. It makes applicable to that area Federal laws and authorizes the Secretary of the Interior to administer the provisions of this title and to adopt such rules and regulations as are not inconsistent with Federal laws to apply therein.
>
> The Secretary of the Interior is also given the discretionary power to adopt the laws of coastal States, if the State so provides, to be applicable to that portion of the area which would be within the boundaries of the State should such boundaries be extended seaward to the outer margin of the Continental Shelf. In this regard, the Secretary determines and publishes the lines limiting each such area.
>
> *Provision is made, however, that State taxation laws cannot apply in these areas.* But provision is made for reimbursement of abutting States for the reasonable cost of the administration of such laws. *Id.* at 2180.

The Senate Committee on Interior and Insular Affairs proposed that the House bill be modified in a number of respects. First, in lieu of extending state laws to the OCS, it provided for the adoption of state laws as the law of the United States applicable to the subsoil, seabed and the structures connected with the development of the mineral resources. See S. Rep. No. 411, 83rd Cong., 1st Sess., p. 2. Since state laws as such were not to apply, the Senate Committee deleted the provision for reimbursement of state expenses. Instead, it provided for the payment of all the revenues into the federal treasury and expressly rejected a number of proposals which would have disbursed such revenues differently. *Id.* at 2-3. One such proposal, specifically rejected by the Committee:

> [W]ould have given to the States one-half of the amount of the additional royalty collected in lieu of State severance taxes to compensate for services rendered the workers of the outer shelf and their families by the States. *Id.* at 3.

In its subsequent analysis of the proposed legislation, the Senate Committee summarized what it had done in this regard as follows:

> Section 9 provides that all rentals, royalties and other sums paid under any lease on the outer Continental Shelf for the period from June 5, 1950, to the time of the enactment of the act, and all such revenues received thereafter, including bonuses paid for leases, shall be deposited in the Treasury of the United States and credited to miscellaneous receipts. As previously stated, *no*

> *part of these revenues are to go to any coastal State for any purpose whatever,* nor does the bill as reported by the committee dedicate them to any specific purpose. Rather, such funds are available for appropriation by the Congress for necessary expenses of Government in accordance with the Constitution of the United States. *Id.* at 13-14.

Just as it thus made clear that the states were not to share in the revenues, the Senate Committee also went out of its way to make clear its intent that state taxation laws were not to apply.

> It is the committee's collective judgment that under the terms of S. 1901 as reported, *State taxation laws necessarily are excluded from applicability in this area of exclusive Federal jurisdiction* not inside the boundaries of any State. Paragraph (3) of section 4(a) specifically commands that—
>
> The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom. *Id.* at 3.

In following the Senate approach as to the applicable law on the OCS, the Conference Committee not only accepted the language which the Senate Committee had

included in its proposed bill as implementing its intent to prohibit the applicability of-state tax laws, but went on to remove any possible lingering doubts on that score by adding the following sentence at the end of paragraph (2) of Section 4(a):

> State taxation laws shall not apply to the outer Continental Shelf.

The Conference Committee explained this addition as follows:

> As provided in the original House bill, State taxation laws are *specifically banned.* 1953 U.S. Code Cong. & Ad. News 2184.

The legislative history thus plainly discloses a considered and deliberate Congressional decision against permitting the adjoining states any access to proceeds from the production of OCS gas, either by way of sharing in the revenues or imposing taxes on it.[7] Instead, Congress specifically decided that the revenues from and resources of the OCS would benefit the nation as a whole and would be beyond the reach of any individual state.

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[7]If Congress had left the door open for coastal states to compensate themselves for alleged costs and impacts associated with OCS development, by enactment of taxes such as the First Use Tax or otherwise, Congress would have had no reason to amend the CZMA to provide for such compensation. *See pp. 55-61 infra.* As in *Malone v. White Motor Corp.*, 435 U.S. 497 (1978), the purpose of a preemptive statute may be ascertained not only from its own legislative history but also from the legislative history of a subsequently adopted statute.

2. The First Use Tax is a Tax on Gas Produced From the Outer Continental Shelf

The OCS bordering Louisiana is a prolific source of natural gas, and much of the gas so produced is transported in and through Louisiana in its journey to the ultimate markets for consumption. The OCS gas thus brought into Louisiana constitutes nearly all of the gas subject to the First Use Tax, and the Louisiana statute is specifically designed to impose a tax on this OCS gas.

By making the tax applicable only to gas "upon which no severance tax or tax upon the volume of production has been paid, or is legally due to be paid, to [Louisiana] or any other state or territory of the United States," Louisiana has in effect exempted any gas produced in neighboring states (and transported into or through Louisiana), as well as that produced in Louisiana, since the legislatures in those states have enacted severance or production taxes applicable to gas produced within their boundaries. *See p. 15 supra.*

On the other hand, the exclusionary language does not extend to gas produced from the OCS. Congress has not imposed any "severance tax or tax upon the volume of production" on gas produced from the OCS. Hence, the OCS gas is not exempt from the First Use Tax. Moreover, and more important for present purposes, the exclusionary language of the First Use Tax would not extend to gas produced from the OCS in any case, *even if Congress had imposed* "a severance tax or tax upon the volume of production" upon such gas. As already noted, the exclusion from the First Use Tax applies only with respect to gas on which a severance tax "has been paid or is legally due to be

paid, to *this state or any other state or territory of the United States*", not to taxes paid or due to the United States itself.

Section 1301C further evidences the design of the First Use Tax to reach primarily OCS gas. That section declares "one of the express purposes of [the] tax" as being "the exaction of ... compensation ... for ... the costs... which ... enure solely to the benefit of the owners of natural gas *produced beyond the boundaries of Louisiana*".

Not only is the First Use Tax designed primarily to reach OCS gas, it is measured by the total volume of gas (in the same manner and at the same rate as Louisiana's severance tax), and is imposed on the owner of the gas, not the "user" thereof. Moreover, "use" as defined in the First Use Tax, Section 1302(8), is a highly artificial concept involving little, if any, actual use of the gas within the State of Louisiana. *See* pp. 34-36 *supra*. These "uses" are merely aspects of the gas' movement in and through the state, and are inextricably connected with its interstate transportation from the OCS to its ultimate destinations.

These factors, taken together, show that the First Use Tax is for all practical purposes a tax on the natural gas produced from the OCS. At the least, it is Louisiana's attempt to use its position as a coastal state to participate directly in the revenues produced from development of OCS gas, thereby circumventing the Congressional decision to the contrary. As such, the First Use Tax frustrates accomplishment of the Congressional purposes and objectives behind the OCSLA.

3. The First Use Tax Interferes With The Comprehensive CZMA-OCSLA Program Enacted By Congress

In enacting the OCSLA, Congress recognized the paramount responsibility of the federal government to regulate OCS activities:

> [B]ecause of the possible conflicts between exploitation of the oil and gas resources in the Outer Continental Shelf and other uses of the marine environment, including fish and shellfish growth and recovery, and recreational activity, *the federal government must assume responsibility for the minimization or elimination of any conflict* associated with such exploitation. 43 U.S.C. 1801(13).

The pervasiveness of federal control over OCS activities is emphasized by the comprehensive manner in which potential OCS impacts on the coastal zone are identified and controlled in the federal regulatory scheme.[8]

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[8]For example, under the OCSLA, a $200 million fund is available to pay for clean up and removal costs incurred by federal, state, and local authorities. 43 U.S.C. 1812 (a),(c)(1). The fund compensates for economic losses including: removal costs and damages including injury to, or destruction of, real or personal property; injury to, or destruction of, natural resources; loss of tax revenue for a period of one year due to injury to real or personal property. 43 U.S.C. 1813(a)(1),(2); 1811 (14),(22).

Strict liability is imposed on operators of OCS offshore facilities for removal and clean up costs, and an amount up to $35 million for all damages, resulting from oil spills. 43 U.S.C. 1814(b)(2).

(footnote continued on next page)

The CZMA recognizes the coastal zone as a resource of local, state and national significance. It also declares energy self-sufficiency to be a national objective. 16 U.S.C. 1451(i). The legislative scheme of the OCSLA-CZMA seeks to balance these objectives so as to preserve the coastal zone environment while accommodating competing uses, including energy related activities, in the area. These objectives are advanced by providing to coastal states federal financial assistance to compensate for impacts derived from OCS energy activities.[9] 16 U.S.C. 1456a(a)(1). Participation by a coastal state in the federal funding program is predicated on its developing a coastal management program which meets criteria set out in the CZMA to plan, preserve, and enhance the coastal zone. 16 U.S.C. 1454(b)(1)-(9), 1456a(g)(1). These programs must be designed to "achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic

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A separate Fisherman's Contingency Fund compensates commercial fishermen for damage or loss to fishing gear and economic losses resulting from OCS activities. 43 U.S.C. 1843(c)(1). The Fisherman's Contingency Fund is supported by fees collected from holders of leases, exploration permits, easements and rights-of-way issued under the OCSLA.

[9]OCS energy activities are defined as:

> Any exploration for, or any development or production of, oil or natural gas from the Outer Continental Shelf . . . or the siting, construction, expansion, or operation of any new or expanded energy facilities directly required by such exploration, development, or production. 16 U.S.C. 1453 (12).

values as well as to needs for economic development. 16 U.S.C. 1452(b).[10]

The CZMA establishes a coastal energy impact fund ("CEIF") program which provides grants, loans, and guarantees to coastal states. The CEIF program compensates for and ameliorates consequences of OCS activity on coastal states, by disbursing monies to such states to enable them to provide new or improved public facilities and services and to retire state and local bonds issued as a result thereof. 16 U.S.C. 1456a(b)(5)(A). Coastal states are also able to utilize CEIF grants to prevent, reduce, or ameliorate loss of valuable environmental or recreational resources resulting from coastal energy activities. 16 U.S.C. 1456a(b)(5)(C).[11] The amount of CEIF money available to a coastal state for reimbursement of costs related to these activities is based on a formula which directly reflects the degree of offshore activity impacting the state. 16 U.S.C. 1456a(b)(2)(A),(B),(C). In addition to these formula grants, funds are also provided to states to study and plan for economic, sociological and environmental consequences of new or expanded OCS activities. 16 U.S.C.

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[10]Management program development grants are provided to reimburse 80% of the costs incurred by a coastal state in developing and implementing an approved coastal management program. 16 U.S.C. 1455(a).

[11]Valuable environmental resources are defined to include "areas of land or water that are or have been largely in a natural state or whose value is derived primarily from ecological considerations" and areas designated under a state's approved coastal zone management program as areas of particular concern. 15 C.F.R. 931.72 (c) (1).

1456a(e)(1). From 1976 to the present, Louisiana has received substantial CEIF monies.[12]

As discussed above, coastal states have repeatedly sought an unfettered share of OCS royalties. *See*, pp. 45-8 *supra*. Congress, in responding to the demands of the coastal states in this regard, instead adopted the CEIF program. The Conference Report regarding the 1978 amendments to OCSLA states:

> The Coastal Energy Impact Program, and in particular, the formula grants section, was intended to satisfy the States' requests for a portion of the revenues which accrue to the Federal Government from the sale of leases on the Outer Continental Shelf. The States argued that most of the social, economic and environmental impacts from OCS development has (sic) occurred, and will continue to occur, in the coastal zone of the States, 1978 U.S. Code Cong. & Ad. News 1599.

That the fund fully compensates for any net adverse impacts on coastal states is evidenced by the following excerpt from the legislative history of the 1976 Amendments to the CZMA:

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12 $56,944,705 -Credit Assitance.
$29,877,340 -Formula Grants
$ 217,406 -Planning Assistance
$ 778,937 -Environmental Grants

Côte de la Louisiane (Coastal Resources Program, Louisiana Department of Transportation and Development) Volume 4, No. 2, September, 1979.

> [I]mpact grants will be made only when a State can demonstrate that an energy facility or energy resource development can be expected to produce a net balance of adverse impacts over the course of its operational lifetime. Demonstration of net adverse impacts is required in recognition of the fact that such a facility or development generally can be expected to produce positive benefits, such as increased tax revenues and assessed property values from land use changes and population increases, as well as negative effects, such as environmental damage or increased demands on public facilities and services. *The purpose of the grant provision in the impact fund is to offset any net amount by which the expected or actual costs exceed the expected or actual benefits.* 1976 U.S. Code Cong. & Ad. News 1791.

Nevertheless, coastal states argued during the hearings to amend the OCSLA in 1978 that the existing $50 million per year CEIF program was inadequate to provide sufficient funds to coastal states. States bordering the Gulf of Mexico also criticized the CEIF program as being insufficient to compensate for past and ongoing OCS activities. Accordingly, the CEIF program was amended to compensate for impacts from past and ongoing OCS activities as well as future ones. However, Congress reaffirmed the existing scheme set out in the CZMA that the CEIF program, not participation in revenue-sharing funds derived from OCS leases, is the sole means of compensating states for the effects of OCS activities:

> Witnesses before the committee divided on an approach to resolve these problems. Some argued for a straight revenue-sharing amendment to the Outer Continental Shelf Lands Act, while other (sic) argued for modification of the CEIF. The committee decided to amend the CZMA. It felt that a revenue-sharing proposal attached to the Outer Continental Shelf Lands Act, with little or no reference to the planning and management work presently being carried out by coastal States might devastate those coastal management efforts.
>
> * * *
>
> Only within the framework of a *comprehensive management program* will Federal OCS funds be utilized in a reasonable and effective manner. 1978 U.S. Code Cong. & Ad. News 1600-1601.

Congressional rejection of a proposed amendment, which would have allowed states to participate in unfettered revenue-sharing, demonstrates the intent of Congress that the CEIF program serve as the sole source of compensation to coastal states. To allow otherwise would have destroyed the comprehensive scheme of the OCSLA-CZMA which ties CEIF participation to coastal management planning.

The First Use Tax is designed primarily to reach natural gas from the OCS. *See* pp. 53-4 *supra.* It is clear from the statutory language and legislative histories of the OCSLA and the CZMA that, prior to creation of the CEIF program, Congress precluded states from participating in OCS derived revenues. The pervasiveness of the OCSLA-

CZMA program in promoting, regulating and compensating for OCS activities evidences the intent of Congress to continue to preclude states from participation in this area, except through the CZMA. The First Use Tax, which will allow Louisiana to amass more than seven times the amount of OCS derived funds available through the CEIF program, will accomplish that which was expressly rejected by Congress.

II.

THE FIRST USE TAX VIOLATES THE COMMERCE CLAUSE

A state tax imposed on interstate commerce or incidents thereof is invalid under the Commerce Clause unless "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *Department of Revenue of Washington v. Ass'n of Washington Stevedoring Companies*, 435 U.S. 734 (1978).

The First Use Tax on its face violates at least two of these criteria: it is not fairly apportioned and thus creates the risk of multiple taxation on the same gas subjected to the First Use Tax; and it unfairly discriminates against interstate commerce.

A. THE FIRST USE TAX IS A TAX ON INTERSTATE COMMERCE.

The only gas subject to the First Use Tax is gas which is produced from the OCS or onshore federal enclaves and transported into and through Louisiana. *See* pp. 33-4, 53-4 *supra.* Although some of the gas subjected to the First Use Tax is ultimately consumed in Louisiana, [13] the vast majority of this gas is merely transported through the state for ultimate consumption in other states. The nature of this movement, from the OCS or onshore federal enclaves into or through Louisiana, constitutes interstate commerce. *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965). Indeed, such federal gas is dedicated to interstate commerce from the moment of its production. 15 U.S.C. 3301(18).

The gas begins its interstate journey when it leaves the production platforms in the Gulf of Mexico and ends it when it is delivered to gas distribution companies or municipalities for distribution to the ultimate consumers, in some cases directly to consumers. While in the State of Louisiana, and while being subjected to the "uses" which nominally give rise to the First Use Tax, the gas does not come to rest, but is constantly moving. The "uses" to which the gas is subjected are inextricably connected with this interstate movement. None of these uses justifies a finding of "separate local activity". *Michigan Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 169 (1954). *See* pp. 34-7 *supra.*

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[13]As a result of the exemptions and credits which are part of the First Use Tax package, Louisiana consumers are effectively relieved from the tax. *See* pp. 78-81 *infra.*

There can be no doubt that the First Use Tax is a tax on interstate commerce. Moreover, a tax, such as this one, designed to single out interstate commerce "must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288, n. 15.

B. THE FIRST USE TAX IS UNAPPORTIONED AND CREATES THE RISK OF MULTIPLE TAXATION

1. The First Use Tax Creates A Substantial Risk of Multiple Taxation

The First Use Tax is imposed on the total volume of natural gas "used" in Louisiana. La. R.S. 47:1303B. Given the all encompassing definition of "use" in Section 1302(8), the First Use Tax will reach virtually every molecule of natural gas produced from the OCS or onshore federal enclaves and transported into or through Louisiana. No attempt is made to apportion the tax to relate to a taxpayer's activities in the state; rather, every taxpayer pays the identical tax on every Mcf of its federal gas subjected to a "use" within the state, regardless of the extent of that taxpayer's activities, revenues or facilities in the state. The tax is, therefore, unapportioned. *See, e.g., Department of Revenue of Washington v. Ass'n of Washington Stevedoring Companies*, 435 U.S. 734, 749, n. 18, discussing *Michigan Wisconsin Pipe Line Co. v. Calvert*.

Unlike traditional use taxes, the First Use Tax is levied on property which has not "come to rest" in the taxing state, but which is continuously moving through the state; its imposition is not related to the consumption of the gas within the state, but rather is on transportation of the gas into or through the state in interstate commerce. The tax is determined by measuring the total volume of gas subjected to the activities defined as "uses".

After the natural gas on which the First Use Tax is imposed leaves Louisiana, it is transported through various states until it reaches its ultimate destinations. Particularly in light of the sweeping nature of "use" as defined in the First Use Tax, it is apparent that, in the course of such transporation, the gas unavoidably is subjected to activities in other states which are the same or similar to those defined as uses in the First Use Tax. Hence, other states, downstream from Louisiana, may impose similar taxes on the same volume of gas.

Since the states in which such activities occur have the same relationship to the gas as Louisiana, if the First Use Tax is upheld, they all would have the constitutional power to impose an identical tax on the same volume of gas as is imposed by the First Use Tax. Thus, the danger of multiple taxation is real and substantial. *See* Mr. Justice Rutledge's single opinion in *McCleod v. Dilworth,* 322 U.S. 327, 349 (1944); *General Trading Co. v. State Tax Comm'n* 322 U.S. 335; and *International Harvester Company v. Department of Treasury,* 322 U.S. 340.

Given the fact that these states have the the same power to tax the same natural gas as Louisiana, Louisiana is barred from imposing this unapportioned tax on the gas. *Standard Oil Co. v. Peck*, 342 U.S. 382 (1952); *Central Railroad v. Pennsylvania*, 370 U.S. 607 (1962). Upholding the validity of the First Use Tax either would abrogate any limitations on state power to tax interstate commerce or would create a "first-come-first-tax" rule [*General Motors Corp. v. Washington*, 377 U.S. 436, 458 (1964) (dissenting opinion)], which would have no support in prior decisions and no relationship to any rational policy of regulating the states' right to generate revenue.

Louisiana has argued that there is no danger of multiple taxation because "the uses upon which the tax is levied do not occur outside" its borders.[14] This is immaterial. The fact that the activities upon which a state tax is purportedly based occur within the taxing state does not insure its constitutionality under the multiple taxation doctrine. If either such activities, or the method of measuring the tax, subject interstate commerce to risk of multiple taxation, the Commerce Clause is violated. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 260 (1938).

The First Use Tax is similar to taxes declared unconstitutional under the multiple taxation test by two earlier decisions of this Court. In *Michigan Wisconsin Pipe Line Co. v. Calvert*, Texas imposed a

[14]Brief in Opposition to Motion for Leave to File Complaint, p. 22.

"gas gathering tax" on the "first taking" of gas into interstate pipelines. The tax was measured by the total volume of gas so taken. Although the "first taking" of the gas occurred in Texas, measuring the tax by the entire volume of gas made it invalid since "if Texas may impose this 'first taking' tax measured by the total volume of gas so taken, then Michigan and the other recipient states have at least equal right to tax the first taking or 'unloading' from the pipeline of the same gas when it arrives for distribution" and "Oklahoma might then seek to tax the first taking of the gas as it crossed into that State". 347 U.S. 157, 170. *See also Department of Revenue of Washington v. Ass'n of Washington Stevedoring Companies,* 435 U.S. 734, 749, n. 18.

In *Gwin, White & Prince, Inc. v. Henneford,* 305 U.S. 434 (1939), the Court reviewed the constitutionality of the Washington business activities tax which was measured by the gross receipts generated by the taxpayer from its business of marketing fruit shipped from Wahington to other states. The tax was invalidated for the following reasons:

> Both the compensation and the tax laid upon it are measured by the amount of the commerce—the number of boxes of fruit transported from Washington to purchasers elsewhere; so that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and with-

out the state and burdens the commerce in direct porportion to its volume. 305 U.S. 434, 438.

As with the unconstitutional tax in *Calvert,* states other than Louisiana may exact a tax, identical to the First Use Tax, on the "last use" or "first in-state use", of the same gas subject to the Louisiana tax. As with the unconstitutional tax in *Henneford,* the First Use Tax, because of the way it is measured, is imposed on the entire interstate activity (transportation of natural gas) both within and without Louisiana.

Thus, the First Use Tax does not pass constitutional muster merely because it is based on alleged "uses" occurring within Louisiana. The method of measuring the tax by the entire volume of natural gas subjects the owners of the gas to the risk of multiple taxation.

2. The Risk of Multiple Taxation, Not its Existence, Is the Proper Test for Determining the Constitutionality Of the First Use Tax

In balancing the states' needs to generate revenue against the federal government's constitutional power to regulate interstate commerce, the Court has uniformly invalidated taxes, such as the First Use Tax, which are not apportioned in some manner to the activities of the taxpayers carried on within their borders. *J.D. Adams Mfg. Co. v. Storen,* 304 U.S. 307 (1938); *Gwin, White & Prince, Inc. v. Henneford; Michigan Wisconsin Pipe Line Co. v. Calvert; Central Railroad Co. v. Pennsylvania,* 370 U.S. 607 (1962); *Evco v. Jones,* 409 U.S. 91 (1972). The "vice characteristic of those [taxes] which have been held invalid

is that they have placed on the commerce burdens of such a nature as to be capable in point of substance, of being imposed ... or added to ... with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce." *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 255-56.

These taxes have been struck down because of the risk that a second state, with an equal constitutional right to tax the same property or transaction as the taxing state, will impose a tax on such property or transaction. "Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids." *J. D. Adams Mfg. Co. v. Storen,* 304 U.S. 307, 311.

The focus of this analysis is on the power of other states to impose similar taxes on the activity or property taxed by the taxing state. If the property or transaction reached by the taxing state could also be taxed by a second state, then an unapportioned tax on the full value of the transaction or the taxpayer's property is unconstitutional. *Standard Oil Company v. Peck,* 341 U.S. 382 (1952); *Michigan Wisconsin Pipe Line Co. v. Calvert; Central Railroad v. Pennsylvania.*

That the risk of multiple taxation is the proper formulation of the test has been recognized by this Court in numerous opinions dealing with varied taxes, such as sales taxes, *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U.S. 33 (1940); gross receipts taxes, *Western Live Stock v. Bureau of Revenue; Gwin, White & Prince, Inc. v.*

Henneford; Evco v. Jones; Standard Pressed Steel Co. v. Washington Dep't of Revenue, 419 U.S. 560 (1975); gross income taxes, *J.D. Adams Mfg. Co. v. Storen;* gas gathering taxes, *Michigan Wisconsin Pipe Line Co. v. Calvert;* and personal property taxes, *Standard Oil v. Peck; Central Railroad v. Pennsylvania.*

Mr. Justice Frankfurter, in *Freeman v. Hewit,* 329 U.S. 249 (1946), rejected the contention that the validity of a gross receipts tax should depend on whether another state has imposed a similar tax on the transaction:

> If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incident of the varying tax laws of the various States at a particular moment. 329 U.S. 249, 256.

Decisions which have required a showing of actual multiple taxation merely evidence the Court's second method for analyzing the multiple tax burden imposed by a state tax in situations where the taxing state has attempted to apportion the tax to activities within its borders.

Thus, in *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450 (1959), the Court reviewed "state net income tax laws levying taxes on that portion of a foreign corporation's net income earned from and fairly apportioned to business activities within the taxing State." 358 U.S. 450, 452. Since "[l]ogically it is impossible, when the tax is fairly apportioned to have the same income taxed twice", 358 U.S. at 462, the Court refused to speculate concerning the multiple burdens imposed by this apportioned tax. Rather, the taxpayers were required to show that the apportionment formula placed a burden upon interstate commerce, a requirement which they failed to meet. The Court indicated that it did not intend for the actual multiple taxation standard to apply to an unapportioned tax by stating that "[t]his is not an unapportioned tax which by its very nature makes interstate commerce bear more than its fair share". *Id.*

In *General Motors corp. v. Washington,* 377 U.S. 436 (1964), the Court reviewed the Washington business activities tax which was measured by gross receipts derived from sales of goods delivered in Washington. Hence, the tax was apportioned to reach only those activities of the taxpayer involving sales consummated within the taxing state. The Court, citing the actual multiple taxation test established in *Northwestern States Portland Cement* for apportioned taxes, held that the taxpayer had failed to meet its burden of proving actual multiple taxation. The Court did not discuss the risk test applicable to unapportioned taxes since this Washington tax, as described in a later decision, was "apportioned exactly to the activities taxed". *Standard Pressed Steel Co. v. Washington Dep't of Revenue,* 419 U.S. 560, 564 (1975).

This substantial burden on taxpayers challenging *apportioned* state taxes, most recently evidenced by the Court's opinion in *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978), has no relevance to taxpayers, such as the pipeline companies here, challenging *unapportioned* state taxes.

The dual analysis applied by the Court to determine the multiple taxation issue is eminently reasonable. It makes clear to the states that the Court will respect their right to collect revenues if they make a reasonable effort not to burden interstate commerce. At the same time, the risk test for multiple taxation invalidates taxes adopted in disregard of the Court's requirement of fair apportionment.

Not only is the First Use Tax unapportioned, it is aimed squarely at interstate commerce. The proper multiple taxation test is whether the *risk* of cumulative taxes exist. This Court need not wait until such a duplicative burden is actually imposed, but rather should take action at this time to safeguard interstate commerce from the risk of multiple taxation.

C. THE FIRST USE TAX DISCRIMINATES AGAINST INTERSTATE COMMERCE

1. The First Use Tax Discriminates Against Interstate Commerce Because It Is Imposed Solely On Natural Gas Transported Into And Through Louisiana From the Outer Continental Shelf And Onshore Federal Enclaves

The First Use Tax applies only to natural gas originating from OCS or onshore federal enclaves, and not

to gas produced in Louisiana. *See* pp. 33-4, 53-4 *supra*. A state tax which is so designed as to apply only to merchandise originating in another state unconstitutionally discriminates against interstate commerce. *Sonneborn Bros. v. Cureton*, 262 U.S. 506, 516 (1923); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

Even accepting *arguendo* Louisiana's erroneous legal conclusion that the "uses" occur prior to the introduction of the gas into interstate commerce,[15] the First Use Tax violates the Commerce Clause because it discriminates solely on the basis of the out-of-state origin of the gas. For purposes of this argument, the critical question is not whether the natural gas is moving in interstate commerce or whether it has come to rest in the state at the time it is subjected to a "use", but whether the First Use Tax is discriminitory because it is imposed on certain gas solely because of its origin outside the state. As the Court stated in *Sonneborn Bros. v. Cureton*, 262 U.S. 506, 516:

> A state tax upon merchandise brought in from another state or upon its sales ... after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence because of its origin in another state.

See also Baldwin v. G.A.F. Seelig, 294 U.S. 511, 527 (1935). In *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 332, n.12 (1977), the Court noted that a state may not tax a local event at the end of interstate commerce if the tax discriminates between transactions on the basis of some

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[15] Brief in Opposition to Motion for Leave to File Complaint, p. 23.

interstate element, citing *International Harvestor Co. v. Dep't of Treasury*, 332 U.S. 340, 347-48 (1944) and *Welton v. Missouri*, 91 U.S. 275 (1876).

Regardless of the legitimacy of the purposes for which the First Use Tax was enacted, they "may not be accomplished by discrimianting against articles of commerce coming from outside the State unelss there is some reason, apart from their origin, to treat them differently." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27. *In City of Philadelphia*, this Court invalidated a New Jersey statute prohibiting the dumping, in New Jersey landfills, of solid wastes originating from other states. New Jersey attempted to support the statute on the grounds that it was a valid exercise of its police powers, and, rather than favoring in-state competitive interests, it actually denied economic opportunities to New Jersey landfill operators, some of whom were plaintiffs in the suit. While this Court accepted *arguendo* the validity of New Jersey's contention, it nevertheless held the statute unconstitutional under the Commerce Clause, since environmental harms suffered by the state obviously were caused equally by solid wastes in interstate and intrastate commerce. Accordingly, it held that, although New Jersey could pursue its health environmental goals by reducing the flow of all solid waste into the state's landfills, the statute blocked "the importation of waste in an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse to New Jersey's landfill sites", 437 U.S. 617, 629, a legislative effort barred by the Commerce Clause.

The First Use Tax is imposed to compensate Louisiana for alleged damage caused by the pipeline industry to the state's water bottoms, barrier islands, and coastal areas and alleged costs incurred by the state in providing services and support to the pipeline industry. La. R.S. 47:1301C, 1303A. However, this supposed damage suffered by Louisiana obviously cannot be attributed solely to the activities of pipelines transporting natural gas produced from the OCS or other federal enclaves. The transportation of oil and gas produced from offshore and coastal areas within the boundaries of Louisiana plainly would cause the same or similar damage and create the need for the same governmental services. Louisiana thus provides no valid justification or explanation for saddling gas produced outside its borders with the entire burden of compensating it for these alleged damages and costs.

Louisiana's sole explanation for imposing the First Use Tax only on the natural gas produced from the OCS or other federal enclaves is that, since natural gas produced in Louisiana and other states has been subjected to a severance tax, it suffers a competitive disadvantage to OCS gas, so that the First Use Tax merely "removes the discrimination or disadvantage imposed upon" gas produced in Louisiana.[16]

This argument amounts to an attempt to justify the First Use Tax under the "compensating tax" theory used to uphold traditional use taxes. *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). Traditional use taxes complement sales taxes by insuring that the *same* activities, purchases at retail, will be subject to an equal tax burden regardless of

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[16]Brief in Opposition to Motion for Leave to File Complant, p. 23.

where the purchase is made, thereby placing the same in-state and out-of-state activities on equal footing. In contrast, severance taxes and the First Use Tax are imposed on different activities to exact compensation for different effects on the taxing state. *see* pp. 77-8 *infra*. They are not complementary, and payment of one is no justification for exemption from the other.

Thus, no reason exists to justify imposing the total burden of this tax on the OCS gas owned by the pipeline companies and moving in interstate commerce. The First Use Tax is a blatant attempt to single out for taxation certain gas solely because of its out-of-state origin.

Regulatory statutes which facially discriminate against articles of commerce solely because of their out-of-state origin have been subjected to a "virtually *per se* rule of invalidity." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624. "At a minimum, such facial discrimination invokes the strictest scrutiny of any legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes v. Oklahoma*, ___ *U.S.* ___, 99 S. Ct. Ct. 1727, 1737 (1979). Because the First Use Tax is characterized by Louisiana as a *tax*, its facial discrimination against interstate commerce renders it invalid without further inquiry. *Boston Stock Exchange v. State Tax Comm'n; Sonneborn Bros. v. Cureton.* This is particularly true of a tax such as the First Use Tax, which is imposed on interstate commerce or incidents thereof. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279.

2. The First Use Tax, In Combination With the Severance Tax Credit, Discriminates Against the Interstate Commerce Conducted By the Pipeline Companies.

Contemporaneously with Louisiana's imposition of the First Use Tax on natural gas produced from the OCS or onshore federal enclaves and transported into or through Louisiana, it enacted the Severance Tax Credit, La. R.S. 47:647 (Appendix F) which allows to "[e]very taxpayer liable for and remitting" the First Use Tax "a direct tax credit, at any time following payment of such tax, but not in excess of the amount which must be borne by such taxpayer, against severance taxes owed by such taxpayer to the state." La. R.S. 47:647A(1).

Since the Severance Tax Credit eliminates the First Use Tax burden on owners of OCS gas which also produce natural resources in Louisiana, its effect is to discriminate against the pipeline companies, which are not engaged in the production of natural resources in Lousiana,[17] in favor of companies ("producers") which, in addition to owning OCS gas subjected to the identical activities as that owned by the pipeline companies, also are involved in local activities which Louisiana seeks to protect and advance: the production of natural resources within the borders of the state.[18]

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[17]Although some of the pipeline companies engage in a small amount of natural gas production in Louisiana, and pay some severance tax on that production, they will not be entitled to claim any severance tax credit on this production until March 31, 1982. La. R.S. 47:647A(2).

[18]The producers, which are the principal beneficiaries of the severance tax credit, are primarily engaged in the production of natural resources. For those companies, transportation of natural gas is merely incidental to their production activities. By contrast, the predominant business activity of the pipeline companies is the transportation and sale of natural gas in interstate commerce.

The Severance Tax is levied as recompense for the severing of natural resources from the soil or water of Louisiana. La. R.S. 47:631; *Edwards v. Parker,* 332 So.2d 175 (La. 1976). Thus, the activities reached by the Severance Tax are totally distinct from the alleged activities on which the First Use Tax is imposed. Similarly, the purposes underlying the two taxes are totally distinct. The Severance Tax is imposed to compensate Louisiana for the loss of natural resources produced from within its borders. The First Use Tax is imposed to compensate Louisiana for the alleged costs incurred by the State in providing services and support to the pipeline industry and the alleged environmental damage caused to the state's coastal areas by such industry. La. R.S. 47:1301C. With the taxes thus imposed being on totally different activities and designed to compensate for the impact of those activities on totally different state interests, they clearly are neither equivalent nor complementary.

The fact that the producers must pay taxes on activities wholly different from and unrelated to those reached by the First Use Tax is no justification for eliminating their First Use Tax liability. The alleged costs of governmental services and impacts on the environment are the same notwithstanding the identity of the taxpayer upon whom the tax is imposed. The Severance Tax Credit, by nullifying as a practical matter the producers' liability for the First Use Tax, violates the condition precedent for a valid state tax: equal tax treatment for taxpayers similarly situated. *Halliburton Oil Well Comenting Co. v. Reily,* 373 U.S. 64 (1963).

Louisiana's discrimination against the interstate commerce conducted by the non-producing pipeline companies cannot be justified under the "compensating tax" theory underlying traditional use taxes, *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), for the same reason that this theory cannot justify the discrimination which results because the First Use Tax is not imposed on gas which is subject to a severance tax. *See* p. 74, *supra.*

The fact that Louisiana has discriminated between two types of interstate commerce, *i.e.*, interstate transportation by the pipeline companies and interstate transportation by the producers, does not save the First Use Tax from invalidity under the Commerce Clause. "[T]he clear import of our Commerce Clause cases is that such discrimination [*i.e.*, "between two types of interstate transactions in order to favor local commercial interests over out-of-state businesses"] is constitutionally impermissible." *Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318, 335 (1977). Louisiana has favored the interstate commerce conducted by the producers in order to encourage the continuance and increase of production acitivities by such companies in the state. By doing so, it has impermissibly discriminated against the interstate commerce conducted by non-producing pipeline companies. The First Use Tax is accordingly invalid.

3. The First Use Tax, in Conjunction With the Tax Credit For Electric And Natural Gas Service And Various Exemptions For In-State Uses Of Natural Gas Otherwise Subject To the Tax, Discriminates Against Interstate Commerce By Imposing the Entire Economic Incidence Of the First Use Tax On Interstate Commerce

The First Use Tax is designed to impose a levy on the interstate transportation of natural gas, the great bulk of which is destined for consumption in other states. In addition, as part of the First Use Tax package, Louisiana also enacted the Tax Credit for Electric and Natural Gas Service (Appendix G), and exemptions for natural gas, otherwise subject to the tax, consumed in specified uses in Louisiana, Section 1303A, to insure, to the maximum practical extent, that its citizens will not incur one iota of additional cost because of the collection of the First Use Tax.

La. R.S. 47:11B provides in part:

> Every electric generating plant and natural gas distribution service municipally owned or regulated, or regulated by the Louisiana Public Service Commission, and every direct purchaser of natural gas from the owner of the natural gas, other than an owner of natural gas regulated by a municipality or the state, for consumption only by such purchaser, shall be allowed a direct tax credit against any tax or combination of taxes, other than severance taxes, owed to the state, upon showing that fuel costs for electricity generation or natural gas distribution or consumption have increased as a direct result of increases in transportation and *marketing costs* of natural gas delivered from the federal domain of the outer continental shelf and upon which such entities are dependent for a portion of their supply.

In Section 1303C, the First Use Tax is declared to be a "cost associated with uses made by the owner in preparation of *marketing* of the natural gas". Thus, it is clear that this tax credit is designed to apply to increased costs attributable to the First Use Tax. Moreover, by providing a credit to Louisiana utilities and direct purchasers of the gas, every Louisiana consumer is effectively shielded from the First Use Tax.

Section 1303A exempts natural gas otherwise subject to the First Use Tax when the gas is used or consumed in Louisiana in the drilling for or production of oil, natural gas and sulphur; in the processing of natural gas; or in the manufacture of fertilizer and anhydrous ammonia. Natural gas consumed for similar purposes in other states is not exempt from the First Use Tax. The result of this disparity in treatment is that certain in-state consumers are favored to the disadvantage of identical out-of-state consumers..

This Court has long recognized that a state tax aimed at the citizens or products of another state is a clear discrimination against interstate commerce. *Welton v. Missouri,* 91 U.S. 275 (1876); *Webber v. Virginia,* 103 U.S. 344 (1880); *Walling v. Michigan,* 116 U.S. 446 (1886); *Robbins v. Taxing District of Shelby County,* 120 U.S. 489 (1887); *Nippert v. City of Richmond,* 327 U.S. 416 (1946). The rationale underlying these and all Commerce Clause discrimination cases is applicable here: a state may not single out interstate commerce for tax treatment not shared by its own residents.

The entire burden of the First Use Tax, which could total annually in excess of $275 million, will ultimately be borne by consumers in states other than Louisiana. As

nonresidents they had no voice in the legislative process which culminated in the passage of the First Use Tax. "Lying back of these decisions is the recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state." *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45, n. 2 (1940).

The economic incidence of the First Use Tax results in an absolute inequality between similarly situated in-state and out-of-state consumers, and thus discriminates against interstate commerce. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963). Louisiana "cannot . . . use a fiscal formula . . . to project the taxing power of the state plainly beyond its borders." *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 365 (1940). The First Use Tax, especially when taken in conjunction with the Tax Credit for Electric and Natural Gas Service and exemptions for certain in-state uses, offends all notions of equal treatment for interstate commerce, and is invalid on its face.

CONCLUSION

For all of the foregoing reasons, the pipeline companies respectfully submit that the First use Tax violates the constitution and laws of the United States and should be declared void and unenforceable.

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APPENDIX

NATURAL GAS ACT 15 U.S.C. 717, *et seq.*

§ 717.

NECESSITY FOR REGULATION OF NATURAL-GAS COMPANIES

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * *

§ 717a. Definitions

SEC. 2. When used in this act, unless the context otherwise requires—

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

§ 717c. Rates and charges; schedules; suspension of new rates

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be

made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company [1a] or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; [1a] and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or

service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

§ 717d. Fixing rates and charges; determination of cost of production or transportation

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective

schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * *

§ 717f. Construction, extension, or abandonment of facilities; certificate of convenience and necessity; condemnation proceedings

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U. S. C. § 717f (a)]

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

APPENDIX B

NATURAL GAS POLICY ACT OF 1978 15 U.S.C. 3301, *et seq.*

§ 3301. Definitions

* * *

(18) Committed or dedicated to interstate commerce.—

(A) General rule — The term "committed or dedicated to interstate commerce", when used with respect to natural gas, means—

(i) natural gas which is from the Outer Continental Shelf; and

(ii) natural gas which if sold, would be required to be sold in interstate commerce (within the meaning of the Natural Gas Act) under the terms of any contract, any certificate under the Natural Gas Act, or any provision of such Act.

(B) Exclusion.—Such term does not apply with respect to—

(i) natural gas sold in interstate commerce (within the meaning of the Natural Gas Act)—

(I) under section 6 of the Emergency Natural Gas Act of 1977;

(II) under any limited term certificate, granted pursuant to section 7 of the Natural Gas Act, which contains a pregrant of abandonment of service for such natural gas;

(III) under any emergency regulation under the second proviso of section 7(c) of the Natural Gas Act; or

(IV) to the user by the producer and transported under any certificate, granted pursuant to section 7 (c) of the Natural Gas Act, if such certificate was specifically granted for the transportation of that natural gas for such user;

(ii) natural gas for which abandonment of service was granted before November 9, 1978, under section 7 of the Natural Gas Act; and

(iii) natural gas which, but for this clause, would be committed or dedicated to interstate commerce under sub-paragraph (A) (ii) by reason of the action of any person (including any successor in interest thereof, other than by means of any reversion of a leasehold interest), if on May 31, 1978—

(I) neither that person, nor any affiliate thereof, had any right to explore for, develop, produce, or sell such natural gas; and

(II) such natural gas was not being sold in interstate commerce (within the meaning of the Natural Gas Act) for resale (other than any sale described in clause (i) (I), (II), or (III)).

* * *

§ 3320. Treatment of state severance taxes and certain production-related costs

(a) **Allowance for State severance taxes and certain production-related costs.**—except as provided in subsection (b) of this section, a price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this part if such first sale price exceeds the maximum lawful price to the extend necessary to recover—

(1) State severance taxes attributable to the production of such natural gas and borne by the seller, but only to the extent the amount of such taxes does not exceed the limitation of subsection (b) of this section; and

(2) any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission.

APPENDIX C

COASTAL ZONE MANAGEMENT ACT, 16 U.S.C. 1451, *et seq.*

§ 1451. Congressional findings

The Congress finds that—

* * *

(i) The national objective of attaining a greater degree of energy self-sufficiency would be advanced by providing Federal financial assistance to meet state and local needs resulting from new or expanded energy activity in or affecting the coastal zone.

* * *

§ 1452. Congressional declaration of policy

The Congress finds and declares that it is the national policy (a) to preserve, protect develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations, (b) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone giving full consideration to ecological, cultural, historic, and esthetic values as well as to needs for economic development.

* * *

§ 1453. Definitions

For the purposes of this chapter—

* * *

(12) The term "outer Continental Shelf energy activity" means any exploration for, or any

development or production of, oil or natural gas from the outer Continental Shelf (as defined in section 1331(a) of Title 43), or the siting, construction, expansion, or operation of any new or expanded energy facilities directly required by such exploration, development, or production.

* * *

§ 1454. Management program development grants—Authorization

* * *

Program requirements

(b) The management program for each coastal state shall include each of the following requirements:

(1) An identification of the boundaries of the coastal zone subject to teh management program.

(2) A definition of what shall constitute permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coastal waters.

(3) An inventory and designation of areas of particular concern within the coastal zone.

(4) An identification of the means by which the state proposes to exert control over the land uses and water uses referred to in paragraph (2), including a listing of relevant constitutional provisions, laws, regulations, and judicial decisions.

(5) Broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority.

(6) A description of the organizational structure proposed to implement such management program, including the responsibilities and interrelationships of local, area wide, state, regional, and inter-state agencies in the management process.

(7) A definition of the term "beach" and a

planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value.

(8) A planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process for anticipating and managing the impacts from such facilities.

(9) A planning process for (A) assessing the effects of shoreline erosion (however caused), and (B) studying and evaluating ways to control, or lessen the impact of, such erosion, and to restore areas adversely affected by such erosion.

No management program is required to meet the requirements in paragraphs (7), (8), and (9) before October 1, 1978.

* * *

§ 1455. Administrative grants—Authorization

(a) The Secretary may make a grant annually to any coastal state for not more than 80 per centum of the costs of administering such state's management program if the Secretary (1) finds that such program meets the requirements of section 1454(b) of this title, and (2) approves such program in accordance with subsection (c), (d), and (e) of this section.

* * *

§ 1456a. Coastal energy impact program—Administration and coordination by Secretary; financial assistance; audit; rules and regulations

(a)(1) The Secretary shall administer and coordinate, as part of the coastal zone management activities of the Federal Government provided for under this chapter, a coastal energy impact program. Such program shall consist of the provision of financial assistance to meet the needs of coastal states and local governments in such states resulting

from specified activities involving energy development. Such assistance, which includes—

(A) grants, under subsection (b) of this section, to coastal states for the purposes set forth in subsection (b)(5) of this section with respect to consequences resulting from the energy activities specified therein;

(B) grants, under subsection (c)(1) of this section, to coastal states for study of, and planning for, consequences relating to new or expanded energy facilities in, or which significantly affect, the coastal zone;

(c) grants, under subsection (c) (2) of this section, to coastal states and units of general purpose local government to assist such states and units to provide new or improved public facilities or public services which are required as a result of coastal energy activity;

(E) guarantees, under subsection (d) (2) of this section and subject to the provisions of subsection (f) of this section, of bonds or other evidences of indebtedness issued by coastal states and units of general purpose local government for the purpose of providing new or improved public facilities or public services which are required as a result of coastal energy activity;

(F) grants or other assistance, under subsection (d)(3) of this section, to coastal states and units of general purpose local government to enable such states and units to meet obligations under loans or guarantees under subsection (d)(1) or (2) of this section which they are unable to meet as they mature, for reasons specified in subsection (d)(3) of this section; and

(G) grants, under subsection (d)(4) of this section, to coastal states which have suffered, are suffering, or will suffer and unavoidable loss of a valuable environmental or recreational resource; shall be provided, administered, and coordinated by the

Secretary in accordance with the provisions of this section and under the rules and regulations required to be promulgated pursuant to paragraph (2). Any such financial assistance shall be subject to audit under section 1459 of this title.

* * *

Grants; calcuations; appropriation adjustments; purposes and priority of proceeds; supervision by Secretary

(b)(1) The Secretary shall make grants annually to coastal states, in accordance with the provisions of this subsection.

(2) Subject to paragraph (3), the amounts payable to coastal states under this subsection shall be, with respect to any such state or any fiscal year, the sum of the amounts calculated, with respect to such state, pursuant to subparagraphs (A), (B) and (C):

(A) An amount which bears, to one-half of the amount appropriated for the purpose of funding grants under this subsection for such fiscal year, the same ratio that the amount of outer Continental Shelf acreage which is adjacent to such state and which is newly leased by the Federal Government in the immediately preceding fiscal year bears to the total amount of outer Continental Shelf acreage which is newly leased by the Federal Government in such preceding year.

(B) An amount which bears, to one-quarter of the amount appropriated for such purpose for such fiscal year, the same ratio that the volume of oil and natural gas produced in the immediately preceding fiscal year from the outer Continental Shelf acreage which is adjacent to such state and which is leased by the Federal Government bears to the total volume of oil and natural gas produced in such year from all of the outer Continental Shelf acreage which is leased by the Federal Government.

(C) An amount which bears, to one-quarter of the amount appropriated for such purpose for such fiscal year, the same ratio that the volume of oil and natural gas produced from outer Continental Shelf acreage leased by the Federal Government which is first landed in such state in the immediately preceding fiscal year bears to the total volume of oil and natural gas produced from all outer Continental Shelf acreage leased by the Federal Government which is first landed in all of the coastal states in such year.

* * *

(5) Each coastal state shall use the proceeds of grants received by it under this subsection for the following purposes (except that priority shall be given to the use of such proceeds for the purpose set forth in subparagraph (A)):

(A) The retirement of state and local bonds, if any, which are guaranteed under subsection (d)(2) of this section; except that, if the amount of such grants is insufficient to retire both state and local bonds, priority shall be given to retiring local bonds.

* * *

(C) The prevention, reduction, or amelioration of any unavoidable loss in such state's coastal zone of any valuable environmental or recreational resource if such loss results from coastal energy activity.

* * *

Rules and regulations; financial assistance, formula, and procedures; criteria for review; criteria and procedures for repayment; loan requirements, terms, and conditions; interest rates

(e) Rules and regulations with respect to the following matters shall be promulgated by the Secretary as soon as practicable, but not later than 270 days after July 26, 1976.

(1) A formula and procedures for apportioning

equitably, among the coastal states, the amounts which are available for the provision of financial assistance under subsection (d) of this section. Such formula shall be based on, and limited to, the following factors:

(A) the number of additional individuals who are expected to become employed in new or expanded coastal energy activity, and the related new population, who reside in the respective coastal states.

(B) The standardized unit costs (as determined by the Secretary by rule), in the relevant regions of such states, for new or improved public facilities and public services which are required as a result of such expected employment and th erlated new population.

* * *

Eligibility requirements; apportionment of assistance

(g)(1) No coastal state is eligible to receive any financial assistance under this section unless such state—

(A) has a mangement program which has been approved under section 1455 of this title;

(B) is receiving a grant under section 1454(c) or (d) of this title; or

(C) is, in the judgment of the Secretary, making satisfactory progress toward the development of a management program which is consistent with the policies set forth in section 1452 of this title.

APPENDIX D

OUTER CONTINENTAL SHELF LANDS ACT 43 U.S.C. 1331 *et seq.*

§ 1331. Definitions

When used in this subchapter—

(a) The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;

* * *

§ 1332. Congressional declaration of policy

It is hereby declared to be the policy of the United States that—

(1) the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control and power of disposition as provided in this subchapter;

(2) this subchapter shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected;

(3) the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs;

(4) since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and noncoastal areas of the coastal States, and on other

affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments—

(A) such States and their affected local governments may require assistance in protecting their coastal zones and other affected areas from any temporary or permanent adverse effects of such impacts; and

(B) such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf;

(5) the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized; and

(6) operations in the outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the water or subsoil and seabed, or other occurrences which may cause damage to teh environment or to property, or endanger life or health.

§ 1333. Laws and regulations governing lands—Constitution and United States laws; laws of adjacent States; publication of projected State lines; international

boundary disputes; restriction on State taxation and jurisdiction

(a)(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artifical islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other then a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

* * *

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and

subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

OUTER CONTINENTAL SHELF LANDS ACT AMENDMENTS OF 1978 43 U.S.C. 1801 *et seq.*

§ 1801 Congressional findings

The Congress finds and declares that—

* * *

(13) because of the possible conflicts between exploitation of the oil and gas resources in the Outer Continental Shelf and other uses of the marine environment, including fish and shellfish growth and recovery, and recreational activity, the Federal Government must assume responsibility for the minimization or elimination of any conflict associated with such exploitation;

* * *

§ 1811. Definitions

* * *

(14) "cleanup costs" means costs of reasonable measures taken, after an incident has occurred, to prevent, minimize, or mitigate oil pollution from such incident;

* * *

(22) "removal costs" means—

(A) costs incurred under subsection (c), (d), or (*l*) of section 1321 of Title 33, and section 1474 of Title 33; and

(B) cleanup costs, other than the costs described in sub-paragraph (A);

* * *

§ 1812. Offshore Oil Pollution Compensation Fund—Establishment in Treasury; limitation on amount; administration by Secretary of Transportation and Secretary of Treasury

(a) There is hereby established in the Treasury of the United States on Offshore Oil Pollution Compensation Fund in an amount not to exceed $200,000,000, except that such limitation shall be increased to the extent necessary to permit any moneys recovered or collected which are referred to in subsection (b)(2) of this section to be paid into the Fund. The Fund shall be administered by the Secretary and the Secretary of the Treasury as specified in this subchapter. The Fund may sue and be sued in its own name.

* * *

Use of moneys; promulgation of regulations

(c) The Fund shall be immediately available for—

(1) removal costs described in section 1811(22) of this title;

* * *

§ 1813. Claims for economic loss from oil pollution—Permissible claims

(a) Claims for economic loss, arising out of or directly resulting from oil pollution, may be asserted for—

(1) removal costs; and

(2) damages, including—

(A) injury to, or destruction of, real or personal property;

(B) loss of use of real or personal property;

(C) injury to, or destruction of, natural resources;

(D) loss of use of natural resources;

(E) loss of profits or impairment of earning capacity due to injury to, or destruction of, real or personal property or natural resources; and

(F) loss of tax revenue for a period of one year due to injury to real or personal property.

* * *

§ 1814. Scope of liability—Liability of owners and operators of non-public vessels or offshore facilities

(a) Subject to the provisions of subsections (b) and (c) of this section, the owner and operator of a vessel other than a public vessel, or of an offshore facility, which is the source of oil pollution, or poses a threat of oil pollution in circumstances which justify the incurrence of the type of

costs described in section 1811(22) of this title, shall be jointly, severally, and strictly liable for all loss for which a claim may be asserted under section 1813 of this title.

Limitation of liability

(b) Except when the incident is caused primarily by willful misconduct or gross negligence, within the privity or knowledge of the owner or operator, or is caused primarily by a violation, within the privity or knowledge of the owner or operator, of applicable safety, construction, or operating standards or regulations of the Federal Government, the total of the liability under subsection (a) of this section incurred by, or on behalf of, the owner or operator shall be—

(1) in the case of a vessel, limited to $250,000 or $300 per gross ton, whichever is greater, except when the owner or operator of a vessel fails or refuses to provide all reasonable cooperation and assistance requested by the responsible Federal official in furtherance of cleanup activities; or

(2) in the case of an offshore facility, the total of removal and cleanup costs, and an amount limited to $35,000,000 for all damages.

* * *

§ 1843. Duties and powers of Secretary—Prescription and amendment of regulations respecting settlement of claims; identification classification of potential hazards to commercial fishing

* * *

Disbursement of payments to compensate commercial fishermen; restrictions

(c)(1) Payments shall be disbursed by the Secretary from the appropriate area account to compensate commercial fishermen for actual and consequential damages, including loss of profits, due to damages to, or loss of, fishing gear by materials, equipment, tools, containers, or other items associated with oil and gas exploration, development, or production activities in such area, whether or not such damage occurred in such area.

* * *

APPENDIX E

FIRST USE TAX ON NATURAL GAS

ACT NO. 294

HOUSE BILL NO. 768

An Act to amend Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950 by adding thereto a new Chapter to be designated as Chapter 16 thereof to contain a Part I comprising Sections 1301 through 1307, providing for the levy and collection of a tax on the first use, in the state of Louisiana, of natural gas produced outside of the territorial limits of the state of Louisiana, which is not subject to the levy of an Import tax or customs duty by the United States as an Import from a foreign country, and upon which no severance tax or tax upon the volume of production has been paid to any state or territory of the United States; providing a definition of first use and for other definitions; providing for exclusions from the tax; providing for the Imposition and rate of the tax; declaring certain contractual agreements unenforceable; providing for the point at which the gas is measured and the tax assessed; providing for the reporting and collection thereof and promulgation of regulations; providing for commingling; providing penalties; providing for the disposition of the collections of the tax; and providing otherwise both generally and specifically with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. Chapter 16 of Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950 containing a Part I and comprising Sections 1301 through 1307 of Title 47 is hereby enacted to read as follows:

CHAPTER 16. FIRST USE TAX

PART I. FIRST USE TAX ON NATURAL GAS

§ 1301. State policy

A. The conservation of natural resources is of vital concern to the present and future welfare of our state and nation, and it is the policy of the state of Louisiana, in the exercise of its police and taxing power, to prevent the physical and economic waste of its natural resources. It is recognized that other existing laws providing limitations upon the production of oil and gas are allowed within the state, and the imposition of a tax upon the severance of these natural resources from the soil and water of the state fail to prevent the economic waste of these Louisiana natural resources and will unfairly tax Louisiana producers in a discriminatory fashion, unless the state equally and uniformly taxes the introduction for the first time into the economy of the state natural gas which has not been otherwise or elsewhere subject to taxation by or within the United States.

B. The waterbottoms, barrier islands and coastal areas within this state are also valuable natural resources, as they provide essential habitat for many forms of wildlife and aquatic life in Louisiana, help protect our coast-line from erosion, and are of aesthetic, commercial and recreational value to the citizens of our state and nation. It is further recognized that while other existing laws, applicable to the production of oil and natural gas, provide recompense in the form of taxes to the people of the state of Louisiana for adverse effects on the natural resources, barrier islands, waterbottoms, and shorelands of this state, these laws fail to provide protection for such valuable natural resources or compensation to the people of Louisiana for the necessary adverse effects caused by entry for use for the first time in

Louisiana, under the protection of the state's laws, of natural gas which has not been subject to taxation otherwise or elsewhere by or within the United States unless the state levies an equitable tax thereon.

C. It is one of the express purposes of this tax to require the exaction of fair and reasonable compensation to the citizens of this state for the costs incurred and paid with public funds, which costs enure solely to the benefit of the owners of natural gas produced beyond the boundaries of Louisiana, although introduced into the state, and to provide some measure of reimbursement to teh citizens for damages to the state's waterbottoms, barrier reefs, and sensitive shorelands as a direct consequence of activity within the state associated with such natural gas by the owners thereof.

§ 1302. Definitions

The definitions hereinafter set forth shall have the meanings ascribed to them unless the context of use clearly indicates otherwise:

(1) "Oil, condensate, distillate or similar hydrocarbons" are liquid hydrocarbons remaining in a liquid state at 15,025 pounds per square inch absolute and sixty degrees Fahrenheit.

(2) "Natural gas" is natural or casinghead gaseous phase hydrocarbons remaining after separation from either oil, condensate, or distillate and measured at a pressure base of 15,025 pounds per square inch absolute at a temperature base of sixty degrees Fahrenheit.

(3) "Processing" is the scrubbing of a natural gas stream by specifically applied mechanical processes of absorption, adsorption, compression, cooling, cryogenics, refrigeration or any combination thereof for the purpose of extracting natural or casinghead gasoline, methane, ethane, propane, butane and other liquefiable hydrocarbons.

(4) "Refining" is the process by which crude oil, distillate and condensate are separated or fractionated into the various component parts or purified.

(5) "Storage" means and include any keeping or retention in this state of oil and natural gas.

(6) "Measurement" is any process by which the volume of natural gas affected by this Part is determined.

(7) "Sale" is the transfer of ownership of and title to natural gas from one person to another for valuable consideration.

(8) "Use" is: the sale; the transportation in the state to the point of delivery at the inlet of any processing plant; the transportation in the state of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; transfer of possession or relinquishment of control at a delivery point in the state; processing for the extraction of liquefiable component products or waste materials; use in manufacturing; treatment; or other ascertainable action at a point within the state.

(9) "Owner" is the person or person having title to and the right to alienate the natural gas subject to the tax at the time a use occurs in the state. It shall not include any person to whom temporary possession or control has been transferred. In the event of a sale the purchaser shall be deemed the owner.

§ 1303 Impostion; exclusions; commingling

A. Pursuant to the exercise of the police and taxing powers of the state for the purpose of preventing economic and physical waste of our natural resources and for protecting and providing compensation for adverse effects upon the state's shorelands, waterbottoms and barrier islands, there is hereby levied and imposed a tax upon the first occurrence within this state of any use, as defined in this Part, of any natural gas upon which no severance tax or

tax upon the volume of production has been paid, or is legally due to be paid, to this state or any other state or territory of the United States, or which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country. The tax levied herein shall not apply to natural gas otherwise subject thereto when such gas is used or consumed in the drilling for or production of oil, natural gas, sulphur, or in the processing of natural gas for liquids extraction within the state; nor shall it apply to gas shrinkage volumes attributable to the extraction of ethane, propane, butanes, natural or casinghead gasoline or other liquefied hydro-carbons, provided shrinkage volumes shall not exceed equivalent gas volumes of the extracted liquids computed by recognized conversion factors used by the Gas Processors Association nor shall it apply to natural gas used or consumed in the manufacture of fertilizer and anhydrous ammonia within the state.

B. The tax imposed by Subsection A of this Section shall be computed at a rate of seven cents on each unit of natural gas as to which a use first occurs within the state. For the purposes of this tax a unit shall be one thousand cubic feet of natural gas as measured at a pressure base of 15.025 pounds per square inch absolute and at a temperature base of sixty degrees Fahrenheit.

C. In furtherance of the public policy and purpose set forth in Section 1301 of this part, and particularly Subsection C of said Section, this tax shall be deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas. Any agreement or contract by which an owner of natural gas at the time a taxable use first occurs claims a right to reimbursement or refund of such taxes from any other party in interest, other than a purchaser of such natural gas, is hereby declared to be against public policy and unenforceable to that extent.

Notwithstanding any such agreement or contract, such an owner shall not have an enforceable right to any reimbursement or refund on the basis that this tax constitutes a cost incurred by such owner by virtue of the separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, or that this tax constitutes any other grounds for reimbursement or refund under such agreement or contract, unless there has been a final and unappealable judicial determination that such owner is entitled to such reimbursement or refund, notwithstanding the public policy and purpose of this part and the foregoing provisions of this Subsection C. In any legal action pursuant to this Subsection, the state shall be an indispensable party in interest.

D. When natural gas subject to the tax levied in this Part is commingled with oil and/or natural gas not subject to the tax levied herein, it shall be presumed that the volumes withdrawn from the commingled mass by the first use shall be in the same ratio as the ratio of the resources entering the commingled mass.

E. Nothing in this Part shall be construed as imposing any tax on the production, severance, or ownership of natural gas produced outside of the boundaries of the state of Louisiana, it being the intention of this Part that the incidence of this tax shall not be upon the natural gas nor upon the property or rights from which it is produced, but rather shall be only upon the privilege of performance or allowing the performance, by the owner, of the enumerated actions comprising first use within the state.

F. If any use as defined in this Part and first occurring is determined not to be a constitutionally taxable incident, the tax shall be imposed upon the use first occurring thereafter.

§ 1304. Authority of the collector of revenue to promulgate rules and regulations

The collector of revenue is authorized to promulgate

rules and regulations necessary to effect the intent and purpose of this Part, including regulations concerning the measurement of products associated with the incidents taxed herein.

§ 1305. Reports and payments; reimbursement limitations

A. The owner or owners of the natural gas at the time a use first occurs in this state shall file with the Department of Revenue and Taxation on or before the last day of each month following the month of first use, statements on forms procured from the department, showing the volumes, values, owners and such other information as the department may require by law or regulation for computing and assessing the amount of tax due under this Part.

B. The taxes levied by this Part shall be due and payable to the Department of Revenue and Taxation monthly on or before the last day of the month following the month to which the tax is applicable by the owner or owners of the natural gas stream at the time any use, as defined herein, first occurs within the state.

§ 1306. Delinquent tax; failure to report or pay

A. The tax provided by this Part shall become delinquent after the date fixed for each monthly report to be filed in the office of the collector, and from such time shall be subject to the addition of interest, penalties, and costs as provided in Chapter 18, Subtitle II of this Title.

B. The failure to report or pay, within ninety days, in the manner and at the time required herein, the tax imposed by this Part on the first use of natural gas is unlawful, and the natural gas shall be deemed illegal gas subject to the provisions of R.S. 30:19 and, as such, shall be treated as contraband and shall be seized and sold as provided by R.S. 30:20.

§ 1307 Disposition of collections

The secretary shall remit all collections of taxes provided by this Part each month to the state treasurer, not later than the tenth day of the month following the month in which collections are made. The state treasurer shall credit all such collections to the state treasury.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

This Act shall become effective immediately upon signature by the governor and the adoption by the legislature of House Bill 140 of the 1978 Regular Session; provided however that taxes shall not begin to accrue on natural gas subject to the tax levied by this Part until 7:00 A.M. on April 1, 1979.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

Section 4. Notwithstanding the provisions of Section 2 of this Act, in the event that a final and unappealable judicial decision is rendered upholding the right of an owner to enforce a contract or agreement otherwise rendered unenforceable by R.S. 47:1303(C) of this Act, the following consequences shall insue:

(1) If the right upheld arises from the provisions of a contract or agreement requiring any other party to reimburse or refund to an owner taxes incurred by such owner by virtue of the separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, then the tax levied in this Act shall not be due in respect to

natural gas previously and thereafter sold pursuant to any contract or agreement containing such requirement, and the secretary of the Department of Revenue and Taxation shall forthwith return to each taxpayer all taxes previously paid in respect to such natural gas, together with interest at the rate of six percent per annum from the date the taxes were paid; or

(2) If the right upheld arises from the provisions of a contract or agreement requiring any other party to reimburse or refund to an owner costs or expenses incurred by such owner by virtue of separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, then this Act shall be null and void and the secretary shall forthwith return to each taxpayer all taxes previously paid, together with interest at the rate of six percent per annum from the date of payment.

All taxpayers receiving refunds and interest pursuant to this Section shall in turn remit such refunds and interest pursuant to this Section shall in turn remit such refunds and interest to all other parties from whom they have received payments pursuant to the aforesaid provisions of such contracts.

Approved July 6, 1978.

APPENDIX F

LOUISIANA GENERAL SEVERANCE TAX CREDIT
La. R.S. 47:631 ***et seq.***

§ 631. Impositions of tax

Taxes as authorized by Section 21 of Article X of the Constitution of Louisiana, are hereby levied upon all natural resources severed from the soil or water, including all forms of timber, including pulp woods, and turpentine and other forest products; minerals such as oil, gas, natural gasoline, distillate, condensate, casinghead gasoline, sulphur, salt, coal, lignite and ores; also marble, stone, gravel, sand, shells and other natural deposits; and the salt content in brine.

* * *

§ 633. Rates of tax

The taxes on natural resources severed from the soil or water levied by R.S. 47:631 shall be predicated on the quantity or value of the products or resources severed and shall be paid at the following rates:

* * *

(9) On gas seven cents per thousand cubic feet, measured at a base pressure of 15,025 poiunds per square inch absolute and at the temperature base of sixty degrees Fahrenheit; provided that whenever the conditions of pressure and temperature differ from the above bases, conversion of the volume from these conditions to the above bases shall be made in accordance with the Ideal Gas Laws with correction for deviation from Boyle's Law, which correction must be made unless the pressure at the point of measurement is two hundred pounds per square inch gauge, or less, all in accordance with methods and

tables generally recognized by and commonly used in the natural gas industry. For all purposes of computing standard cubic feet of gas under this Section the barometric pressure shall be assumed to be 14.7 pounds per square inch absolute at the place of measurement.

* * *

LOUISIANA FIRST USE TAX-SEVERANCE TAX CREDIT

§ 647. Severance tax credit, priority

A. (1) Every taxpayer liable for an remitting taxes levied and collected pursuant to R.S. 47:1301 through R.S. 47:1307 and each taxpayer who bears such taxes as a direct result of contractual terms of aggrements applied in disregard to R.S. 47:1303(C), shall be allowed a direct tax credit, at any time following payment of such tax, but, not in excess of the amount which must be borne by such taxpayer, against severance taxes owed by such taxpayer to the state, the amount of which credit shall not exceed the amount of severance taxes for which such taxpayer is liable to the state as a direct consequence of the privilege of severing natural resources from the surface of the soil or water of the state. A taxpayer who bears any portion of the tax levied pursuant to R.S. 47:1301 through R.S. 47:1307 as a direct result of contractual terms or agreements applied in disregard to R.S. 47:1303(C), shall be entitled to a credit under this Section only after there has been a determination by the Louisiana Supreme Court or the appropriate United States District Court that such taxpayer must bear the tax, provided that if the taxpayer or the state has sought and been denied a preliminary injunction enjoining the application of such contractual terms or agreements sought to be rendered in applicable by R.S. 47:1303(C), then such taxpayer shall be entitled to a credit under this Section from

the date of denial of the preliminary injunction. In the event that this Section is declared invalid as to tax credit authorized hereunder, such invalidity shall be prospective only.

(2) The tax credit provided in Paragraph (1) of this Subsection shall be allowed in the following manner: The credit shall be applied first against any severance tax owed on oil as provided in R.S. 47:633(7). If there is any credit remaining that the taxpayer may still apply against severance taxes after applying it against oil, the balance shall then be applied against any severance tax owed on distillate, condensate, or similar natural resources as provided in R.S. 47:633(8)(a). Any balance of credits then remaining which the taxpayer may apply against severance taxes owned, shall be applied against natural gasoline, casinghead gasoline, and other natural gas liquids, ethane, or methane recovered through processing gas after separation of oil, distillate, condensate, or similar natural resources as provided in R.S. 47:633(8)(b). If there remain any tax credits that may be applied against severance taxes owed by the taxpayer, he may then apply them against severance taxes owed on sulphur as provided in R.S. 47:633(10). If there remain any tax credits thereafter that may be applied against severance taxes owed by the taxpayer, he may then apply them against severance taxes owed on gas as provided in R.S. 47:633(9); provided however, that such credits which may be applied against severance taxes owed on gas shall not be allowed until after March 31, 1982.

B. No tax credit pursuant to this Section shall be allowed for any taxes remitted pursuant to R.S. 47:1301 through 1307 for which a taxpayer has an enforceable right to reimbursement from a third party. A taxpayer claiming any credit under this Section shall furnish to the secretary of the Department of Revenue and Taxation all applicable contracts and other information requested by the secretary,

which relate to such taxpayer's possible right to reimbursement. If the secretary determines that the taxpayer has an enforceable right to reimbursement, which the taxpayer is not actually receiving, the secretary shall so rule. WIthin thirty days of receipt of notice of such ruling the taxpayer shall have the right to appeal such ruling to the Louisiana Board of Tax Appeals which board shall determine in open meeting whether there is sufficient evidence to support the ruling of the secretary. If the board determines that there is not sufficient evidence it shall overrule the secretary and the taxpayer shall not be required to take any other action in order to receive the tax credit provided by this Section. If the board determines that there is sufficient evidence, the taxpayer shall thereafter have a period of ninety days within which to institute any administrative or judicial proceedings necessary to assert such right to reimbursement. The taxpayer shall pursue such administrative or judicial proceedings with due diligence. At all times prior to commencement of such administrative or judicial proceedings and during the pendency thereof, and during any appeals therefrom, the taxpayer shall continue to be entitled to the credit provided in this Section; provided that if no action is taken by the taxpayer to assert the right to reimbursement within ninety days no further credit shall be granted and the state shall have the right to recover from the taxpayer any credits granted prior to the expiration of such time. If it is determined in any administrative proceedings that a taxpayer has no right to such reimbursement, then the taxpayer shall not be entitled to continue receiving the credit allowed by this Section, unless the taxpayer within the time allowed by applicable law seeks judicial review of such administrative determination and pursues such judicial review to a final and unappealable judgment. If the administrative or judicial determination establishes that the taxpayer has an enforceable right to reimbursement of the

taxes levied pursuant to R.S. 47:1301 through 1307, and if the taxpayer is so reimbursed, then such taxpayer shall be liable to the state for additional severance taxes equivalent to the amount of taxes levied under R.S. 47:1301 through 1307 for which such taxpayer has received reimbursement. The taxpayer shall also pay to the state interest on such taxes at the rate prescribed in R.S. 47:1601, accruing from the date on which the credit attributable to such taxes was taken to the date of final payment but only to the extent of any interest which the taxpayer has itself received on the amount of reimbursement.

C. The credit allowed by this Section shall not affect the percentage allocation of severance tax proceeds otherwise due to any parish, and the secretary of the Department of Revenue and Taxation, with the concurrence of the state treasurer shall, by regulation,establish such procedures as may be deemed necessary to provide therefor.

D. The secretary of the Department of Revenue and Taxation shall promulgate rules and regulations necessary for the implementation and administration of the tax credit provided for herein.

APPENDIX G

TAX CREDIT FOR ELECTRIC AND NATURAL GAS SERVICE La. R.S. 47:11

§ 11. Tax credit for electric and natural gas service

A. Recognizing that the state of Louisiana must depend upon natural gas produced in the federal domain of the outer continental shelf as a supplement to its declining domestic supply, and recognizing that this natural gas is regulated exclusively by agencies of the federal government and is therefore outside of the regulatory jurisdiction of the state of Louisiana, and that the necessarily higher transportation and marketing costs for such natural gas results in higher fuel costs for utilities and industries within the state dependent thereon, the following tax credits, being deemed fair and in the best interest of the state, are hereby authorized.

B. Every electric generating plant and natural gas distribution service municipally owned or regulated, or regulated by the Louisiana Public Service Commission and every direct purchaser of natural gas from the owner of the natural gas, other than an owner of natural gas regulated by a municipality or the state, for consumption only by such purchaser, shall be allowed a direct tax credit against any tax or combination of taxes, other than severance taxes, owed to the state, upon showing that fuel costs for electricity generation or natural gas distribution or consumption have increased as a direct result of increases in transportation and marketing costs of natural gas delivered from the federal domain of the outer continental shelf and upon which such entities are dependent for a portion of their supply. Increased transportation and marketing costs shall be issued tax warrants in amounts not to exceed in the aggregate the difference between the increase in the fuel costs and the tax or taxes owed to the state, which tax

warrants may be used in the payment of any tax or combination of taxes owed to any parish, municipality, political subdivision or other taxing authority of the state. Tax credits and warrants shall be issued annually hereunder and shall not exceed two million dollars inthe aggregate. No electric generating plant, natural gas distribution service, or other affected purchaser shall be issued tax credits or warrants totaling less than two hundred fifty dollars annually, except that increased costs totaling less than the minimum credit established herein may be carried forward and accumulated for three years from the year in which the increased costs occur in order that the applicant may utilize the tax credit authorized herein prior to the end of the prescriptive period otherwise set forth in this Title. In the event that total increased fuel costs exceed two million dollars in the aggregate, the Secretary of the Department of Revenue and Taxation shall issue tax credits and warrants based on a formula to be fixed by regulation which shall insure each qualifying applicant a proportionate share of the maximum tax credits established herein.

C. The secretary of the Department of Revenue and Taxation shall promulgate rules providing for the determination of the amount of any tax credit or tax warrant provided for herein and for administration of the provisions of this Section.

D. The state shall have a right of recovery of tax credits granted pursuant to this Section in the event that increased transportation and marketing costs for which credits ar granted hereunder are reimbursed or refunded for any reason to any entity receiving the credit.

CERTIFICATE OF SERVICE

I, Daniel F. Collins, a member of the Bar of this Court, do hereby certify that three (3) copies of each of the foregoing motions and brief were served upon each other party separately represented in this proceeding by depositing said copies in the United States mail, properly addressed, with airmail postage prepaid, pursuant to Rule 33 of the Rules of the Court, this 5th day of November, 1979.

_____

Daniel F. Collins

No. 83, Original

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF MARYLAND, ET AL., PLAINTIFFS

v.

STATE OF LOUISIANA

ON MOTION FOR JUDGMENT OF THE PLEADINGS

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 83, Original

STATE OF MARYLAND, ET AL., PLAINTIFFS

v.

STATE OF LOUISIANA

ON MOTION FOR JUDGMENT OF THE PLEADINGS

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

This brief is filed pursuant to Rule 42(4) of this Court's Rules on behalf of the United States and the Federal Energy Regulatory Commission in support of plaintiff's motion for judgment on the pleadings.

JURISDICTION

The motion for leave to file a complaint invoking the original jurisdiction of this Court was granted on June 18, 1979. The jurisdiction of this Court rests on the Constitution of the United States, Article III, Section 2, clauses 1 and 2, and 28 U.S.C. 1251(a)(1).

QUESTIONS PRESENTED

1. Whether the Louisiana First Use Tax on Natural Gas is invalid because it conflicts with the exclusive statutory jurisdiction of the Federal Energy Regulatory Commission to regulate the sale and transportation of natural gas in interstate commerce, and the apportionment of costs among producers, processors, and consumers.

2. Whether the Louisiana First Use Tax violates the Commerce Clause of the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, clause 3 ("Commerce Clause"), and Article VI, clause 2 ("Supremacy Clause") of the Constitution of the United States are set forth in plaintiffs' Brief in Support of Motion for Judgment on the Pleadings, at page 4.

The First Use Tax on Natural Gas, La. Rev. Stat. Ann. §§ 47:1301-47:1307 (West Supp. 1979), the First Use Tax on Natural Gas—Severance Tax Credit, La. Rev. Stat. Ann. § 47:647 (West Supp. 1979), the First Use Tax Trust Fund, La. Rev. Stat. Ann. § 47:1351 (West Supp. 1979), and the Tax Credit to Operators of Electric Generating Plants and Natural Gas Distribution Services, La. Rev. Stat. Ann. § 47:11 (West Supp. 1979), are set forth at pages 1a-20a in the Appendix to Plaintiffs' Brief in Support of Motion for Judgment on the Pleadings.

Sections 4, 5, and 7 of the Natural Gas Act of 1938, 15 U.S.C. 717c, 717d, 717f, and Sections 2(18),

110, 121(b), and 601 of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3351, 3354, 3368-3369, 3370, 3409-3411 are set forth in the Appendices, *infra*, pages 1a-19a.

THE INTEREST OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION

Plaintiff States [1] seek a declaratory judgment that the Louisiana First Use Tax on Natural Gas [2] is unconstitutional and an order permanently restraining the collection of the tax and compelling the refund of all revenues collected plus "all interest earned on such revenues" (Complaint at 6 ¶ II). After the Court

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[1] Plaintiffs are the States of Maryland, Illinois, Indiana, Michigan, New York, Rhode Island, Wisconsin, and the Commonwealth of Massachusetts. Plaintiffs sue "in their proprietary capacities as substantial purchasers of natural gas" subject to the First Use Tax, and in their *parens patriae* capacities on behalf of their citizens who will purchase such gas (Complaint at 6-7 ¶ III). Subsequent to the Court's granting of the plaintiffs' Motion for Leave to File the Complaint, New Jersey filed a motion for leave to intervene, to file a complaint, and a brief in support thereof. Seventeen interstate natural gas pipeline companies have also sought leave to intervene. Finally, a motion for leave to file a brief *amicus curiae* and the brief have been filed on behalf of Associated Gas Distributors.

[2] Act No. 294, 1978 La. Sess. Law Serv. 482 (West), codified as La. Rev. Stat. Ann. §§ 47:1301-47:1307 (West Supp. 1979) (Mot. App. 1a-8a). Hereinafter, the various provisions of the act will be referred to by the section number used in the codification, and the act itself will be referred to as the "First Use Tax" or the "Act".

granted plaintiffs' Motion for Leave to File the Complaint, and directed Louisiana to answer, Louisiana answered the complaint, and moved for appointment of a Special Master. Plaintiffs have now moved for judgment on the pleadings with respect to certain claims presented in the complaint and have filed an answer in opposition to the motion for appointment of a Special Master. In response, Louisiana has filed a motion to dismiss the complaint.

The Act in question imposes a tax on seven cents per thousand cubic feet ("Mcf") by the State of Louisiana on the first "use" of natural gas in Louisiana originating outside of that state that moves in interstate commerce. The principal impact of the tax is on gas produced from federally leased areas on the Outer Continental Shelf ("OCS gas"), and on gas imported from abroad. Because first "use" is defined so broadly as to include even the measurement of gas flowing in interstate commerce, the tax will add at least $225 million per year to the cost of gas used by consumers in approximately 30 states.

As a consumer of natural gas in the operation of military and civilian installations, the United States is directly affected by the additional costs imposed by the First Use Tax. The United States is also the lessor under leases authorizing various persons to produce natural gas from federal enclaves and the Outer Continental Shelf, over which it has exclusive jurisdiction (see 43 U.S.C. 1331-1343). If the federal government's lessees are compelled to pay the First Use Tax, the revenues received by the United States

from these leases could be significantly affected. Moreover, under the Constitution, the federal government is responsible for the regulation of interstate and foreign commerce. It is therefore directly concerned with any state tax that may improperly burden or operate inconsistently with those functions.

Finally, the First Use Tax directly conflicts with the authority of the Federal Energy Regulatory Commission. Under the Natural Gas Act, 15 U.S.C. 717-717w,[3] and the Natural Gas Policy Act of 1978 ("NGPA"), Pub. L. No. 95-621, 92 Stat. 3351 (1978), the Commission is responsible for the regulation of the interstate sale and transportation of natural gas and the cost and rates of pipelines, including the apportionment of costs among producers, processors, and consumers of natural gas. The only proceeding in which a state tax may be challenged in Louisiana is a suit for refund of the amounts paid under protest.[4] Because the First Use Tax falls principally on gas moving in interstate commerce, the Commission has been forced to promulgate regulations that would permit interstate pipelines to pass along in their rates the additional costs resulting from the imposition of the tax to their customers, subject to refund if the tax is ultimately held to be unconsti-

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[3] See page 11, note 20, *infra*.

[4] La. Rev. Stat. Ann. § 47:1576 (West Supp. 1979). Neither injunctive nor declaratory relief restraining the collection of a tax prior to payment is available. Sections 47:1575, 47:1576.

tutional.[5] Thus, the Louisiana tax has imposed substantial administrative and regulatory burdens upon the Commission.

STATEMENT

1. *The Nature of the Louisiana Tax.* The First Use Tax imposes a volume tax of seven cents per thousand cubic feet (subject to certain exclusions), upon the first "use" within Louisiana of any natural gas that is not subject to any severance or production tax levied by Louisiana or any other state or territory of the United States, or is not subject to any import tax or tariff levied by the United States on imports from foreign countries. La. Rev. Stat. Ann. § 47:1303 A (West Supp. 1979) (Mot. App. 4a-5a).[6] The rate of the tax is equivalent to the rate of the Louisiana severance tax on natural gas.[7]

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[5] *State of Louisiana First Use Tax in Pipeline Rate Cases*, Order No. 10, 43 Fed. Reg. 45553 (1978), Order No. 10-A, 43 Fed. Reg. 60438 (1978), Order No. 10-B, 44 Fed. Reg. 13460 (1979), petitions for review pending *sub nom. Tennessee Gas Pipeline Company, et al.* v. *Federal Energy Regulatory Commission*, No. 78-3816 (5th Cir.).

[6] The tax does "not apply to natural gas otherwise subject thereto * * * *used* or consumed in the drilling for or production of oil, natural gas, sulphur, or in the processing of natural gas for liquids extraction within [Louisiana]; [or] to gas shrinkage volumes attributable to the extraction of ethane, propane, butanes, natural or casinghead gasoline or other liquefied hydrocarbons. * * * [; or] to natural gas used or consumed in the manufacture of fertilizer and anhydrous ammonia within [Louisiana]." Section 47:1303 A (emphasis added).

[7] See La. Rev. Stat. Ann. § 47:633(9)(a) (West Supp. 1979).

The term "use" is defined broadly as "[1] the sale; [2] the transportation in [Louisiana] to the point of delivery at the inlet of any processing plant; [3] the transportation in [Louisiana] of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; [4] transfer of possession or relinquishment of control at a delivery point in [Louisiana]; [5] processing for the extraction of liquefiable component products or waste materials; [6] use in manufacturing; [7] treatment; or [8] other ascertainable action at a point within [Louisiana]." La. Rev. Stat. Ann. § 47:1302(8) (West Supp. 1979) (Mot. App. 4a).[8] The First Use Tax recites that it is "a cost associated with uses made by the owner in preparation of [*sic*] marketing of the natural gas," (La. Rev. Stat. Ann. § 47:1303 C) (West Supp.

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[8] If any enumerated use "first occurring is determined not to be a constitutionally taxable incident, the tax shall be imposed upon the use first occurring thereafter." La. Rev. Stat. Ann. § 47:1303 F (West Supp. 1979) (Mot. App. 6a). The Act provides that if the section reciting that the tax is a cost associated with uses made by the owner in preparation or marketing of the gas is held invalid, the entire Act shall be void. § 4(2), 1978 La. Sess. Law Serv. 486 (Mot. App. 8a). The remaining parts of the Act are severable. Sections 2, 4, 1978 La. Sess. Law. Serv. 485, 486 (Mot. App. 7a, 8a).

[9] La. Rev. Stat. § 47:1302(9) (West Supp. 1979) (Mot. App. 4a) defines "owner" as "the person having title to and the right to alienate the natural gas subject to the tax at the time a use occurs in [Louisiana except] any person to whom temporary possession or control has been transferred. In the event of a sale the purchaser shall be deemed the owner."

1979)[9] and not a tax on the natural gas itself.[10] The First Use Tax also expressly abrogates provisions of existing contracts which underlie and form the basis for certificates of public convenience and necessity issued by the Federal Energy Regulatory Commission concerning the apportionment of taxes among sellers, processors, and purchasers of gas. See La. Rev. Stat. Ann. § 47:1303 C (West Supp. 1979) (Mot. App. 5a).

The First Use Tax is not levied on gas subject to a production or severance tax imposed by Louisiana or any other state or any import tax imposed by the United States. Almost every state, including Louisiana,[11] has a severance tax. However, the United States does not levy any import taxes upon gas from abroad.[12] As a result, the impact of the First Use Tax is on gas produced from federal enclaves or from the Outer Continental Shelf (to which state severance taxes do not apply)[13] or on gas imported from foreign

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[10] The First Use Tax statute recites that it is not imposed "on the production, severance, or ownership of natural gas produced outside of the boundaries of the State of Louisiana * * * [and] that the incidence of this tax shall not be upon the natural gas nor upon the property or rights from which it is produced, but rather shall be only upon the privilege of performance or allowing the performance, by the owner of the enumerated actions comprising first use within [Louisiana]." La. Rev. Stat. Ann. § 47:1303 E (West Supp. 1979) (Mot. App. 6a).

[11] La. Rev. Stat. Ann. §§ 47:631-47:646 (West 1970).

[12] See 72 Stat. 72, 19 U.S.C. 1202, Schedule 4, Part 10, Item 475.15.

[13] *E.g., Mississippi River Fuel Corp.* v. *Cocreham*, 382 F.2d 929 (5th Cir. 1967), cert. denied, 390 U.S. 1014 (1968);

countries.[14] While the First Use Tax is applicable to gas from all of these three sources, the Louisiana legislature intended that the principal target of the tax would be OCS gas.[15]

What is more, the practical impact falls on gas that passes through the state, since Louisiana allows all electric generating utilities, gas distribution companies, and other persons in Louisiana who purchase natural gas directly from an interstate pipeline a credit against their Louisiana state and local taxes for any increases in the transportation and marketing costs for federal-domain Outer Continental Shelf gas

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accord, *Humble Pipe Line Co.* v. *Waggonner*, 376 U.S. 369 (1964). See also Outer Continental Shelf Lands Act, Section 4(a)(2), Pub. L. No. 83-212, 67 Stat. 462, 43 U.S.C. 1333 (a)(2).

[14] The First Use Tax will fall on gas imported directly into Louisiana, and on gas first imported into another state which flows through Louisiana. Beginning in 1980, liquefied natural gas from Algeria will be imported into the United States through facilities located near Lake Charles, Louisiana. *Trunkline Gas Co., et al.*, Docket No. CP74-138, *et al.*, Opinion No. 796-A (June 30, 1977). In addition an agreement has been reached with the Republic of Mexico for the importation of natural gas from that country. See Washington Post, Sept. 22, 1979, page A1, col. 5. This gas will be imported through existing and proposed facilities at Reynosa, Mexico, near Hidalgo, Texas. *Border Gas, Inc.*, Docket No. CP80-75, Application for Authority pursuant to Section 3 of the Natural Gas Act to Import Natural Gas from Mexico, at 2 (filed November 9, 1979). Initially, that gas will be imported into the United States through facilities owned by Texas Eastern Transmission Corporation. *Id.* at 3-4. A portion of such gas will be transported through Louisiana and will therefore become subject to the First Use Tax.

[15] See *Hearings on H.B. 768 Before the Revenue and Fiscal Affairs Committee of the Louisiana Senate*, 1 (Governor

which they purchase.[16] Because Louisiana has characterized the First Use Tax as a cost of transporting and marketing gas (La. Rev. Stat. Ann. § 47:1303 C, E (West Supp. 1979)), this credit allows Louisiana consumers who consume gas subject to the First Use Tax to offset increased rates for natural gas attributable to that tax through reductions in other taxes paid to Louisiana. Indeed, the very purpose of the credit is to ensure that Louisiana consumers do not bear any of the costs associated with the First Use Tax.[17]

2. *The Federal Regulation of Natural Gas.* Two statutes—the Natural Gas Act[18] and the Natural Gas Policy Act of 1978[19]—prescribe the nature and extent of federal regulation of the sale and transportation of natural gas in interstate commerce.

Edwards), 3 (Rep. Tauzin), 13 (Mr. Slaton) (1978); *Hearings on H.B. 768 Before the Committee on Ways and Means of the Louisiana House of Representatives,* 7 (Rep. Tauzin) (Hearing of June 5, 1978); *id.* at 8-9, 16 (Mr. Brooksher), 25-36 (Mr. Woodward) (Hearing of June 6, 1978).

[16] See Act No. 599, Tax Credits to Operators of Electric Generating Plants and Natural Gas Distribution Services, 1978 La. Sess. Law. Serv. 1112, codified as La. Rev. Stat. Ann. § 47:11 (West Supp 1979).

[17] *Hearings on H.B. 768 Before The Committee On Ways and Means of the Louisiana House of Representatives, supra,* at 4 (Colloquy between Representative Tauzin and unidentified speakers), 5 (Colloquy between Representatives Sour and Bagert), 6 (Representative Laborde) (Hearing of June 5, 1978).

[18] 15 U.S.C. 717-717w.

[19] Pub. L. No. 95-621, 92 Stat. 3351.

a. *The Natural Gas Act.* The Natural Gas Act conferred upon the Federal Power Commission the authority to regulate "the transportation of natural gas in interstate commerce [and] the sale [of natural gas] in interstate commerce for resale to consumers." *California* v. *Southland Royalty Co.*, 436 U.S. 519, 524 (1978).[20] Sales for resale by producers are likewise subject to regulation under the Act. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954).

Section 7 of the Natural Gas Act prohibits any person from selling or transporting natural gas in

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[20] On October 1, 1977, pursuant to the Department of Energy Organization Act ("DOE Act"), Pub. L. No. 95-91, 91 Stat. 565, 42 U.S.C. (Supp. I) 7101, *et seq.*, and Executive Order No. 12,009, 42 Fed. Reg. 46267 (1977), the Federal Energy Regulatory Commission (DOE Act, Section 401(a), 42 U.S.C. (Supp. I) 7171(a)) succeeded to certain functions of the Federal Power Commission. The successor Commission continues to have the authority to establish rates and charges for the transportation and sale for resale of natural gas in interstate commerce, to issue certificates of public convenience and necessity, and to regulate abandonments of service. DOE Act Section 402(a)(1)(C), (D), 42 U.S.C. (Supp. I) 7172(a)(1)(C), (D). In addition, the Secretary of Energy, pursuant to Sections 402(e) and 642 of the DOE Act, 42 U.S.C. (Supp. I) 7172(e) and 7252, the Secretary of Energy has delegated to the Commission the authority to determine rates and charges, and to issue certificates of public convenience and necessity, for the sale or transportation of natural gas imported into the United States from a foreign country. *Importation and Exportation Of Natural Gas*, 43 Fed. Reg. 47769, 47772 (1978).

The Commission also succeeded to the authority of the Interstate Commerce Commission to establish rates and charges for the transportation of oil by pipeline and the valuation of such pipelines. See DOE Act, Section 402(b), 42 U.S.C. (Supp. I) 7172(b).

interstate commerce without first obtaining a certificate of public convenience and necessity from the Commission. See 15 U.S.C. 717f(c). Section 7(e) provides that the "Commission * * * [may] attach to * * * [such] certificate[s] * * * such reasonable terms and conditions as the public convenience and necessity may require" (15 U.S.C. 717f(e)). Finally, Section 7(b) prohibits the termination of certificated service without the prior approval of the Commission. 15 U.S.C. 717f(b); *e.g.*, *United Gas Pipe Line Co.* v. *McCombs*, No. 78-17 (June 18, 1979), slip op. 6-10; *California* v. *Southland Royalty Co.*, *supra.*

Once service has commenced, "sections 4 and 5 of the Natural Gas Act, 15 U.S.C. 717c and 717d, mandate the Commission to set just and reasonable rates for the [transportation and] sale of interstate natural gas." *Federal Energy Regulatory Commission* v. *Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979). All such rates and contracts affecting such rates must be just and reasonable. Section 4(a), 15 U.S.C. 717c(a). Accordingly, all rates and contracts must be filed with the Commission (Section 4(c), 15 U.S.C. 717c(c)), which may suspend temporarily the operation of, and investigate, newly filed rates and contracts. If the Commission finds that any rate or contract is not just and reasonable, it "shall determine the just and reasonable rate, * * * or contract * * *" (Sections 5(a), 15 U.S.C. 717d(a)).

b. *The Natural Gas Policy Act.* The Natural Gas Policy Act of 1978 (NGPA) modifies the scheme of producer regulation under the Natural Gas Act. It prescribes maximum lawful prices for all natural gas

produced in the United States and rules for recovery of those costs in interstate transactions, excludes certain "first sales" of natural gas from the Commission's jurisdiction under the Natural Gas Act. It does not, however, alter the Commission's jurisdiction over the transportation of natural gas in interstate commerce, or any sales for resale subsequent to first sales by interstate pipelines except as provided in Section 601, 92 Stat. 3409-3411. Nor does the NGPA modify the Commission's authority over the transportation of liquid and liquefiable hydrocarbons by pipeline in interstate commerce pursuant to the DOE Act and the Natural Gas Act.

The NGPA specifies maximum lawful prices for all "first sales" [21] of natural gas produced in the United States, whether sold in interstate commerce or intrastate commerce.[22] NGPA Sections 102-109, 92 Stat. 3358-3368. These prices may be adjusted for state severance taxes [23] and for "any costs of compressing, gathering, processing, treating, * * * or transporting such natural gas, * * * borne by the seller and allowed for * * * by the Commission." [24]

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[21] A "first sale" is "any [sale, exchange, or other transfer for value] of any volume of natural gas * * * to any interstate * * * or intrastate pipeline, * * * local distribution company[,] or [user of natural gas,] and [any sale] * * * which precedes or follows any [such] sale * * * and is defined by the Commission as a first sale in order to prevent circumvention of any maximum lawful price established under this Act." NGPA Section 2(21), 92 Stat. 3355.

[22] These maximum prices may be collected only if contractually authorized. NGPA Section 101(b)(9), 92 Stat. 3358.

[23] NGPA Section 110(a)(1), 92 Stat. 3369.

[24] NGPA Section 110(a)(2), 92 Stat. 3369.

The maximum lawful prices authorized by the NGPA are deemed just and reasonable for purposes of the Natural Gas Act. NGPA Section 601(b)(1)(A), 92 Stat. 3410. Thus, the "Commission may not deny, or condition the grant of, any certificate under section 7 of the Natural Gas Act based upon the amount paid in any [first] sale * * * if such amount is deemed to be just and reasonable under subsection (b)" (Section 601(c)(1), 92 Stat. 3411). Likewise, the Commission may not "deny any interstate pipeline [the right to recover] any amount paid [for] any purchase of natural gas if * * * under subsection (b) * * *, such amount is deemed just and reasonable for purposes of sections 4 and 5 of [the Natural Gas] Act" (Section 601(c)(2)(A), 92 Stat. 3411).

The NGPA also excludes from the Commission's jurisdiction under the Natural Gas Act certain first sales of natural gas in interstate commerce and persons making only such sales. Natural gas not "committed or dedicated to interstate commerce" before the effective date of the NGPA never becomes subject to the Commission's jurisdiction even if sold in a first sale in interstate commerce. NGPA Section 601(a)(1)(A), 92 Stat. 3409.[25] However, gas is "committed or dedicated to interstate commerce" if

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[25] The Commission's jurisdiction under the Natural Gas Act also ceases with respect to first sales of certain classes of natural gas which were committed or dedicated to interstate commerce prior to the effective date of the NGPA. Section 601(a)(1)(B), 92 Stat. 3409.

it "is from the Outer Continental Shelf" or, if it would be required to be sold in interstate commerce (within the meaning of the Natural Gas) under the terms of any contract, any certificate under the Natural Gas Act, or any provision of such Act." NGPA Section 2(18)(A), 92 Stat. 3354; H.R. Rep. No. 95-1752, 95th Cong., 2d Sess. 71 (1978).

Under Section 311(a) of the NGPA (92 Stat. 3388-3389), the Commission may authorize interstate pipelines to transport natural gas for intrastate pipelines and local distribution companies (Section 311(a)(1), 92 Stat. 3388), and intrastate pipelines to transport natural gas for interstate pipelines and local distribution companies served by interstate pipelines (Section 311(a)(2), 92 Stat. 3389). Such transportation and the persons providing the transportation service are not subject to the Commission's jurisdiction under the Natural Gas Act. NGPA Section 601(a)(2), 92 Stat. 3409-3410. The Commission may also authorize intrastate pipelines to sell natural gas to interstate pipelines or local distribution companies served by interstate pipelines, or to assign the right to purchase natural gas to such persons. NGPA Sections 311(b), 312, 92 Stat. 3389-3391, 3392. These sales and the persons making them are not subject to the Commission's jurisdiction under the Natural Gas Act. NGPA Section 601(a)(1)(C), (D), 92 Stat. 3409.

In sum, the Commission's jurisdiction under the Natural Gas Act over the transportation of natural gas in interstate commerce and sales for resale in

interstate commerce other than "first sales" remains undisturbed except as noted above. The Commission continues to determine the terms on, and rates and charges at, which natural gas may be transported in interstate commerce pursuant to the provisions of the Natural Gas Act.[26] The only limitations on this authority are the requirement that the Commission may not deny, or condition a certificate to require gas to be sold at a price other than that permitted under the NGPA, or deny full recovery of amounts paid to purchase such gas if the price paid for such gas is deemed just and reasonable (NGPA Section 601(c), 92 Stat. 3411), and the exclusion of certain sales and transportation arrangements from its jurisdiction under the National Gas Act (NGPA Section 601(a)(1)(C), (D), (2), 92 Stat. 3409-3410).

SUMMARY OF ARGUMENT

I.

The Louisiana First Use Tax conflicts with the federal regulation of the sale and transportation of natural gas in interstate commerce and is therefore invalid under the Supremacy Clause of the Constitution. Although couched in terms of a tax on the "use" of natural gas, the principal impact of the levy is to increase the price of gas extracted from federally-leased areas on the Outer Continental Shelf and from federal enclaves or of gas imported from abroad and

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[26] It also continues to prescribe rates and charges for the transportation of liquid and liquefiable hydrocarbons. See page 11, note 20, *supra*, and pages 32-33, note 36, *infra*.

shipped through Louisiana in interstate commerce. Since Congress by the Natural Gas Act and the Natural Gas Policy has vested in the Federal Energy Regulatory Commission the exclusive authority to set rates for the sale and transportation of such natural gas in interstate commerce, the Louisiana tax is incompatible with the federal regulatory scheme.

Contrary to the assertion of Louisiana, the decisions of this Court establish that the interstate journey of the gas subject to tax is not interrupted by the occurrence of any of the taxable "uses" enumerated in the Louisiana statute unless the gas is sold for ultimate consumption in Louisiana. Thus, whatever the extent of processing or treatment that occurs within Louisiana, it is settled that such processing does not break the interstate journey of gas that is produced outside of Louisiana and is brought into and/or through Louisiana for ultimate consumption in other states. It is therefore clear that the Louisiana tax trenches upon "matters which directly affect the ability of the [Commission] to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which [is] an objective of the Natural Gas Act [and the Natural Gas Policy Act]." *Northern Natural Gas Co.* v. *Kansas Commission*, 372 U.S. 84, 91-92 (1963).

II.

The Louisiana First Use Tax is also invalid under the Commerce Clause. The Commerce Clause flatly prohibits state taxation of goods that are merely in

transit through the state when the tax is assessed. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954). While the Louisiana tax is characterized as "upon the privilege of performance or allowing the performance by the owner, of the enumerated actions comprising first use within Louisiana" (La. Rev. Stat. Ann. § 47:1303 E (West Supp. 1979) (Mot. App. 6a)), the provisions of the Act demonstrate that the tax falls on the transportation of the natural gas within Louisiana, not the privilege of use. Stripped to its essentials, the Louisiana levy is nothing more than an "unapportioned levy on the transportation of the entire volume of gas" *Wash. Rev. Dept.* v. *Stevedoring Ass'n*, 435 U.S. 734, 749 n. 18).

Even if the Louisiana First Use Tax is not simply a transit levy on gas moving in interstate commerce, it is nevertheless invalid because it is not fairly apportioned and because it discriminates against interstate commerce. It is not related to either the value of identifiable activities occurring within the taxing state, the taxpayer's investment in facilities within the state, its gross income from business or the percentage of business conducted within the state, or the length of the facilities or distance traveled within the state.

The Louisiana tax also discriminates against interstate commerce in two distinct ways. First, while Louisiana has prohibited the purchasers of gas subject to the tax from shifting it to the producer, it does not prohibit purchasers of gas subject to its severance

tax from shifting all or part of the tax to the producer. The practical effect of prohibiting the shifting of the First Use Tax, while allowing the shifting of the severance tax, is to impose a tax on Outer Continental Shelf, federal enclave, and imported gas which is greater than the tax imposed on gas produced within Louisiana.

Finally, the Louisiana First Use Tax discriminates against interstate commerce by requiring out-of-state consumers to bear the entire burden of the levy. This discrimination is accomplished by a system of credits designed to ensure that Louisiana consumers are relieved of any First Use Tax liability. The Louisiana tax therefore "falls short of the substantially even-handed treatment demanded by the Commerce Clause." *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 332 (1977).

III.

The resolution of the questions presented does not require the appointment of a Special Master. The decisions of this Court establish as a matter of law that the gas moves in interstate commerce when the enumerated taxable uses occur. Once the interstate movement of the gas is recognized, plaintiffs' claims under the Supremacy and Commerce Clauses can be resolved by testing the Louisiana tax statute under the precedents of this Court. No evidence is required on these constitutional questions.

ARGUMENT

I. THE LOUISIANA FIRST USE TAX CONFLICTS WITH THE FEDERAL REGULATION OF THE SALE AND TRANSPORTATION OF NATURAL GAS IN INTERSTATE COMMERCE AND IS THEREFORE INVALID UNDER THE SUPREMACY CLAUSE OF THE CONSTITUTION

A. Introduction

"[I]t was settled even before the passage of the Natural Gas Act, that *direct* regulation of the prices of wholesales of natural gas in interstate commerce is beyond the constitutional power of the States—whether or not framed to achieve ends, such as conservation, ordinarily within the ambit of state power." *Northern Natural Gas Co.* v. *Kansas Commission*, 372 U.S. 84, 90 (emphasis in original). In passing the Natural Gas Act in 1938 and the Natural Gas Policy Act in 1978, Congress did something more. In the Court's words, "[t]he Congress enacted a comprehensive scheme of federal regulation of 'all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company[,]' *Phillips Petroleum Co.* v. *Wisconsin*, [347 U.S. 672] at 682 * * *" (372 U.S. at 91) (footnote omitted).

The exclusive federal regulation of the sale and transportation of natural gas in interstate commerce preempts all forms of state regulation not expressly authorized by NGPA. Thus, for example, in *Northern Natural Gas Co.* v. *Kansas Commission*, *supra*, this

Court held that orders of a state commission—requiring an interstate pipeline company to purchase ratably from all wells connecting with its pipeline system in each gas field within the state—were an invalid encroachment upon the exclusive regulatory jurisdiction of the Federal Power Commission. In so holding, the Court observed that "[t]he federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas * * * or for state regulations which would indirectly achieve the same result. These state orders necessarily deal with matters which directly affect the ability of the Federal Power Commission to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act. They therefore invalidly invade the federal agency's exlusive domain" (372 U.S. at 91-92).

Judged by this standard, the Louisiana First Use Tax is invalid. Although couched in terms of a tax on the "use" of natural gas, we shall show that the principal impact of the levy is to increase the price of gas extracted from federally-leased areas on the Outer Continental Shelf and federal enclaves or of gas imported from abroad and shipped through Louisiana in interstate commerce. Indeed, the term "use" is defined so broadly as to include any "ascertainable action at a point within [Louisiana]" taken with respect to such gas shipped in interstate commerce. Since Congress has vested in the Federal Energy Regulatory Commission the exclusive authority to set

rates for the sale and transportation of such natural gas, the Louisiana tax is incompatible with the federal regulatory scheme.

Like the plaintiff states, we believe that the invalidity of the Louisiana tax can be demonstrated as a matter of law on the pleadings and that there are no factual questions that require the appointment of a Special Master. Once it is recognized that the impact of the Louisiana tax is on gas produced from fields located on the Outer Continental Shelf, or from fields within federal enclaves, or from abroad and transported across Louisiana, and that such gas moves in interstate commerce, the exclusive federal regulatory jurisdiction over such gas, and the incompatibility of the tax with that exclusive jurisdiction, are established. We therefore now turn to a description of the mechanics of the Louisiana tax and the movement of the natural gas upon which it is imposed.

B. The Gas Subject To The First Use Tax Moves In Interstate Commerce

As we have already explained, the Louisiana First Use Tax applies to three categories of natural gas: OCS gas, federal enclave gas and imported gas. Gas in each of these three categories moves in interstate commerce as that term is defined by the decisions of this Court.

It has long been established that natural "gas which crosses a state line at any stage of its movement from welhead to ultimate consumption[,]" or gas which is commingled with gas so moving, is in interstate

commerce during the entire journey. *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, 369 (1965).[27] That journey commences at the wellhead (*California* v. *Lo-Vaca, supra; East Ohio Gas Co.* v. *Tax Commission*, 283 U.S. 455 (1931)). It ends after the pressure is reduced and the gas is delivered into local distribution systems for ultimate consumption (*Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 472-473 (1950); *East Ohio Gas Co.* v. *Tax Commission, supra*, 283 U.S. at 470), or after the gas is delivered to an industrial user for consumption (15 U.S.C. 717(b)), or to a distribution company, or intrastate pipeline, which is subject to state or local regulation, at the border of, or within, a state, and the gas is actually consumed within that state (15 U.S.C. 717(c)). This standard applies to each of the categories of gas involved in this case.

a. *OCS gas.* OCS gas is produced from "field[s] * * * *located outside the borders of any state and any gas taken will have to be transported across state lines for sale* within the United States." *Continental Oil Co.* v. *Federal Power Commission*, 370 F.2d 57, 66

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[27] See also *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 467, 469-472 (1950); *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, 687-689 (1947); *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 503-506 (1942); *East Ohio Gas Co.* v. *Tax Commission of Ohio*, 283 U.S. 465, 470 (1931); *Peoples Natural Gas Co.* v. *Public Service Commission of Pennsylvania*, 270 U.S. 550, 554 (1926); *Louisiana Public Service Commission* v. *Federal Power Commission*, 359 F.2d 525, 527-528 (5th Cir. 1966); *Deep South Oil Co. of Texas* v. *Federal Power Commission*, 247 F.2d 882, 887-889 (5th Cir. 1957), cert. denied, 355 U.S. 930 (1958).

(5th Cir. 1966) (emphasis in original), cert. denied, 388 U.S. 910 (1967). Thus, "the onshore movement of gas produced in the Federal domain offshore Louisiana constitutes interstate commerce within the meaning of the Natural Gas Act * * *." *Chandeleur Pipe Line Co.*, 42 F.P.C. 25 (1969). *See also United Gas Pipe Line Co.*, 30 F.P.C. 560, 563-564 (1963). Furthermore, most of the OCS gas which enters Louisiana is transported through that state for ultimate consumption in other states.[28] This interstate movement is not interrupted by any of the taxable uses described in La. Rev. Stat. Ann. § 47:1302(8) (West Supp. 1979), unless the gas is sold to a local distribution company, intrastate pipeline, or user of gas within Louisiana, for ultimate consumption there.

b. *Federal enclave gas.* Federal enclave gas from Barksdale Air Force Base also moves in interstate commerce. That gas is processed near the field in plants owned by Union Texas Petroleum Company and Arkansas Louisiana Gas Company. The gas is then delivered to Arkansas Louisiana Gas Company, Mississippi River Transmission Corporation, Texas Gas Transmission Company, and United Gas Pipe Line Company. Some of this gas is sold to distribution companies and directly to industrial and other users in Louisiana; the remainder is transported to

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[28] *Hearings on H.B. 768 Before the Committee on Ways and Means of the Louisiana House of Representatives*, 7 (Rep. Tauzin) (Hearing of June 5, 1978); *id.* at 9 (Mr. Brooksher) (Hearing of June 6, 1978); *Hearings on H.B. 768 Before the Revenue and Fiscal Affairs Committee of the Louisiana Senate*, 4 (Rep. Tauzin) (1978).

out-of-state consumers. The total volume of gas from Barksdale Air Force Base either moves in interstate commerce or is commingled with such gas. Thus, such federal enclave gas moves in interstate commerce from the time it leaves the wellhead until it is sold for ultimate consumption within Louisiana or other states.

c. *Imported gas.* Gas imported from Mexico will enter the United States through existing connections near Hidalgo, Texas, where it will enter facilities operated by Texas Eastern Transmission Corporation. In these facilities, the imported gas will be commingled with gas produced in Texas, and the commingled stream will be transported into Louisiana, where some of the stream will be sold, and then on to other states where the remainder is sold for ultimate consumption. The movement of this imported gas into and/or through Louisiana is in interstate commerce.

Gas imported from Algeria as liquefied natural gas is carried in special tankers that will dock near Lake Charles, Louisiana. There, the gas will be temporarily stored, vaporized, and delivered to Trunkline Gas Company for transportation through Louisiana for sale and delivery to consumers in Louisiana and other states. *Trunkline LNG Co., et al.*, Opinion No. 796 (Apr. 29, 1977) 2-3. The movement of the liquefied gas to the onshore storage tanks is in interstate, if not foreign, commerce. See *Atlantic Coast Line R.R.* v. *Standard Oil Co.*, 275 U.S. 257, 267 (1927). And the movement of the vaporized gas in Trunk-

line's interstate pipeline is clearly in interstate commerce.

C. The Taxable "Uses" Enumerated In The Louisiana Statute Do Not Interrupt The Journey Of The Gas In Interstate Commerce

Louisiana does not dispute the fact that each of the three categories of gas to which the First Use Tax applies—OCS gas, federal enclave gas, and imported gas,—moves in interstate commerce. It contends, however, that extensive processing and treatment of the gas occurs in Louisiana and that these activities interrupt the journey of the gas in interstate commerce and thereby justify imposition of the tax (see Motion to Dismiss, 22-26; Answer at 11, ¶ XXXV; 13, ¶ XL).

But the decisions of this Court establish that the interstate journey of OCS, federal enclave, and imported natural gas is not interrupted by the occurrence of any of the taxable "uses" enumerated in the Louisiana tax statute unless the gas is sold for ultimate consumption in Louisiana. Thus, whatever the extent of processing or treatment that occurs within Louisiana, it is settled that such processing does not break the interstate journey of gas that is produced outside of Louisiana and is brought into and/or through Louisiana for ultimate consumption in other states. We turn now to a discussion of each of the taxable "uses" enumerated in the Louisiana First Use Tax Statute.

1. The "sale" or "transfer of possession or relinquishment of control at a delivery point [within Louisiana]" (La. Rev. Stat. Ann. § 47:1302(8)

(West Supp. 1979)) does not necessarily interrupt the interstate movement of gas subject to the First Use Tax. *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co., supra,* 314 U.S. at 503-504; *Peoples Natural Gas Co.* v. *Public Service Commission,* 270 U.S. 550, 554 (1926).

In transactions involving gas that is sold and/or delivered to another pipeline, which transports the gas, or commingles it with gas transported, out of Louisiana, or sells and/or delivers the gas to a third pipeline, which transports the gas out of Louisiana, "the particular point at which the title and custody of the gas pass to the purchaser, without arresting its movement to its intended destination, does not affect the essential interstate nature of the business." *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co., supra,* 314 U.S. at 503-504.[29]

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[29] On the other hand, if the gas is sold and delivered to an intrastate pipeline, or distribution company at the border of, or within, Louisiana, and is actually consumed within that state, it ceases to be in interstate commerce once that delivery is made. 15 U.S.C. 717(c); *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co., supra,* 314 U.S. at 503-504; *Federal Power Commission* v. *East Ohio Gas Co., supra,* 338 U.S. at 472-473. The same is true if gas is sold and delivered to an industrial or other user within Louisiana. 15 U.S.C. 717(b); *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission,* 332 U.S. 507 (1947).

Gas which is subject to the First Use Tax and which is "use[d] in manufacturing" in Louisiana (§ 47:1302(8)) has ceased to be in interstate commerce with its delivery to the manufacturer, or the local distribution company or intrastate pipeline which serves that manufacturer.

2. The "transportation in [Louisiana] to the point of delivery at the inlet of any processing plant" or "the transportation in [Louisiana] of unprocessed gas to the point of delivery at the inlet of any measurement or storage facility" (La. Rev. Stat. Ann. § 47:1302(8)) by an interstate pipeline does not interrupt the interstate movement of the gas. To the contrary, such transportation is an inseparable segment of the interstate movement of the gas from the wellhead to the ultimate consumers located in Louisiana and in other states. Cf. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 163 (1954); *Area Rate Proceeding (Southern Louisiana Area)*, 40 F.P.C. 530, 611 (1968).

3. The delivery of gas to the operator of a treating and/or processing plant, treatment of the gas for removal of impurities and/or waste products, and processing to extract liquid and liquefiable hydrocarbons (see § 47:1302(8)) do not interrupt the interstate movement. Instead, as this Court has observed, the "[t]he entire movement of the gas, from the producing wells through the [processing plants] and into the [interstate] pipeline[s] to consumers outside [Louisiana] is a steady and continuous flow." *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 163 (1954); *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, 685 n.7 (1947). Thus, "processing does not interrupt the continuous movement of the gas from the wellhead to consumer burner tips * * *." *Deep South Oil Co.* v. *Federal Power Commission, supra*, 247 F.2d at 888.

4. The storage of gas within Louisiana by an interstate pipeline, which may constitute "other ascertainable action at a point within the state" (§ 47:1302(8)) does not interrupt the interstate movement if it is a temporary incident of such movement. Cf. *Board of Trade of City of Chicago* v. *Olsen*, 262 U.S. 1, 33-34 (1923).[30] This gas has moved in interstate commerce prior to storage and will so move upon withdrawal from storage in the manner previously authorized by the Commission until such time as the Commission, by an amendment to the certificate authorizing operation of the storage facility, authorizes a different movement. The seasonal storage of such gas does not break the interstate journey because the gas is stored to facilitate its movement to the ultimate consumers, whether in Louisiana or in other states, during the winter heating season when the demand for gas is the greatest.[31] *Cf. Champlin Realty Co.* v. *Brattleboro*, 260 U.S. 366, 376-377 (1922).

The temporary storage of liquefied natural gas to permit it to be reconverted by vaporization to its normal gaseous state is likewise a segment in the movement of the gas from foreign producers to consumers in the United States.[32] Such storage does not

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[30] Storage of gas subject to the First Use Tax by an intrastate pipeline, local distribution company, or industrial or other consumer of gas within Louisiana presents a different legal issue. Such gas has ceased to be in interstate commerce by reason of the sale of such gas to those persons.

[31] See Federal Power Commission *National Gas Survey*, Vol. I, at 39-40, 44-46, 47 (1975).

[32] *National Gas Survey, supra*, Vol. II, at 406.

break the interstate movement because it is equivalent to storage in transit. See *Board of Trade of City of Chicago* v. *Olsen*, 262 U.S. 1, 33-34 (1923); cf. *Atlantic Coast R.R.* v. *Standard Oil Co.*, *supra*, 275 U.S. at 267-270. Nor does the vaporization of the liquefied natural gas break the interstate journey because "mere changes in the method of transportation do not affect the continuity of the transit." *Minnesota* v. *Blasius*, 290 U.S. 1, 10 (1933).

D. The Louisiana Tax Interferes With The Federal Regulation Of The Transportation And Sale Of Natural Gas In Interstate Commerce

Once it is recognized that the First Use Tax is imposed upon OCS, federal enclave, and imported natural gas, and that each of these categories of gas move in interstate commerce, it is readily seen that the Louisiana levy interferes with the federal regulation of the transportation and sale of gas in interstate commerce and is therefore invalid under the Supremacy Clause.[33]

We focus first on Section 47:1303 C as it interferes with the Commission's regulation of the transportation and sale of natural gas in interstate com-

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[33] "Although [these claims are] basically constitutional in nature, deriving [their] force from the operation of the Supremacy Clause, Art. VI, cl. 2, they are treated as 'statutory' for purposes * * * of deciding statutory claims first to avoid unnecessary constitutional adjudications." *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 271-272 & n. 6 (1977); *Hagans* v. *Lavine*, 415 U.S. 528, 549 (1974).

merce. By the terms of the First Use Tax Act, § 4(2), 1978 La. Sess. Law. Serv. 486, if that provision is unconstitutional, the entire statute becomes void.[34] Thus, if the Court holds Section 47:1303 C invalid under the Supremacy Clause, it need not reach any of plaintiffs' other claims.[35]

Section 47:1303 C declares the First Use Tax to be "a cost associated with uses made by the owner in preparation of [sic] marketing of the natural gas[,]." It abrogates "agreement[s] or contract[s] by which an owner of natural gas at the time a taxable use first occurs claims a right to reimbursement or refund of such taxes from any other party in interest, other than a purchaser of such natural gas * * * on the basis that this tax constitutes a cost incurred by such owner by virtue of the separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, or * * * any other grounds for reimbursement or refund * * *." Louisiana's answer

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[34] See *Hearings on H.B. 768 Before the Revenue and Fiscal Affairs Committee of the Louisiana Senate*, 4, 13, 28 (Representative Tauzin) (1978).

[35] Contrary to Louisiana's denial (Answer at 17-18 ¶ XLVIII), Section 47:1303 C is a regulation of the transportation and sale of natural gas in interstate and foreign commerce. To " 'regulate' is to lay down the rule by which a thing shall be done." *Federal Power Commission* v. *Corporation Commission of Oklahoma*, 362 F.Supp. 522, 532 (W.D. Okla. 1973) (three judge court), aff'd per curiam, 415 U.S. 961 (1974). As it prescribes "the rule by which natural gas produced [outside of Louisiana's taxing jurisdiction] may move from [Louisiana] to other states[,] [§ 47:1303 C] constitute[s], therefore, a regulation * * * " (362 F. Supp. at 533).

states that "the sole purpose, intent, and application of [47:1303 C is] to ensure that the First Use Tax will not unreasonably burden any person within the interstate commerce stream but will be passed along to the ultimate users and consumers." Answer at 21 ¶ LX. It is therefore plain that Section 47:1303 C seeks to regulate the apportionment of costs among producers, processors, and pipelines, and therefore interferes with the Commission's jurisdiction.

1. Section 47:1303 C impinges upon the Commission's ratemaking authority under Sections 4 and 5 of the Natural Gas Act (15 U.S.C. 717c, 717d). Insofar as it characterizes the First Use Tax as a cost associated with uses of the gas by the interstate pipeline owner and abrogates contractual provisions which would require persons other than gas consumers to bear the tax, Section 47:1303 C interferes with the Commission's authority to allocate costs between gas consumers and the owners of liquid and liquefied hydrocarbons which are carried by interstate pipelines.

Because many natural gas pipelines transport extractable hydrocarbons as well as natural gas (see page 37 & note 39, *infra*), the Commission must determine which costs should be borne by natural gas consumers and which should be borne by the owners of the extractable hydrocarbons.[36] The First Use Tax,

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[36] *Mobil Oil Corp.* v. *FPC*, 483 F.2d 1238, 1241-1243, 1247, 1249 (D.C. Cir. 1973); *City of Detroit* v. *FPC*, 230 F.2d 810, 819-821 (D.C. Cir. 1955), cert. denied, 352 U.S. 829 (1956); *Cities Service Gas Co.* v. *FPC*, 155 F.2d 694, 703 (10th Cir.),

like other taxes and costs, is an element of the pipelines' costs of service. *Federal Power Commission* v.

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cert. denied, 329 U.S. 773 (1946); *Hope Natural Gas Co.* v. *FPC*, 134 F.2d 287, 307-308 (4th Cir. 1943), rev'd on other grounds, 320 U.S. 591 (1944); *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635, 641-642 (1945); *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 588-590 (1945); see cases cited at page 38, note 41, *infra*.

When these cases were decided, the Commission could not directly prescribe rates for the transportation of liquid hydrocarbons; it could only assign costs to that service and preclude the recovery of such costs in rates charged natural gas consumers. *Mobil Oil Corp.* v. *FPC*, *supra*, 483 F.2d at 1246-1249. Arguably, the Commission could regulate the terms on, and rates at, which liquefiable hydrocarbons—those hydrocarbons produced with natural gas existing in a gaseous state when produced and transported that may be extracted from the gas stream by processing, liquefied, and treated as liquids (*id.* at 1241)—are transported in interstate commerce pursuant to the Natural Gas Act (*id.* at 1242, 1246, 1249). The Commission's authority to regulate the transportation of liquid, and perhaps liquefiable, hydrocarbons by interstate natural gas pipelines (cf. *id.* at 1242-1243), was established when the DOE Act vested the Commission with jurisdiction to set rates for the transportation of oil by common-carrier pipeline (DOE Act, Section 402(b), 42 U.S.C. (Supp. I) 7172(b)), including any "petroleum byproducts, derivates or petrochemicals." H. Rep. No. 95-539, 95th Cong., 1st Sess. 69 (1977). Thus, the Commission may now prescribe directly the rates for the transportation of liquid and liquefiable hydrocarbons by natural gas pipelines providing common carriage for such products. Accordingly, since any natural gas pipeline operating on the Outer Continental Shelf, which carries liquid and liquefiable hydrocarbons for producers, must operate as a common carrier (43 U.S.C. 1334(c)), the Commission may now prescribe directly the rates for the transportation by pipeline of liquid hydrocarbons as well as for the liquefiable hydrocarbons and natural gas carried by such pipelines.

United Gas Pipe Line Co., 386 U.S. 243 (1967). It is for the Commission and the Commission alone to determine whether this cost should be borne by gas consumers or others. *Id.* at 243-246.

The Commission has therefore consistently held that a pipeline's natural gas customers do not receive any benefits from the pipeline's transportation of liquid and liquefiable hydrocarbons for the owners, and that the costs associated with the transportation and delivery of those products at the inlet of a processing plant must be borne by the producers, who benefit from such activities, and not by natural gas consumers. See page 38, note 41, *infra*. The Commission has also held that costs associated with the processing of natural gas to extract the liquid and liquefiable hydrocarbons must be borne by the owners of those products, and not by the natural gas consumers.[37]

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[37] Natural gas is processed to extract liquid and liquefiable hydrocarbons because those products are considered more valuable than the processed gas. *E.g.*, *Deep South Oil Co. of Texas* v. *Federal Power Commission*, *supra*, 247 F.2d at 888; *National Rates for Natural Gas*, 54 F.P.C. 3090, 3096-3102 (1975), reh. denied, 15 P.U.R. 4th 1, 12-13 (1976), aff'd in part and rev'd in part on other grounds, *sub nom. Tenneco Oil Co.* v. *Federal Energy Regulatory Commission*, 571 F.2d 834, 844-845 (5th Cir. 1978). The removal of these hydrocarbon products does not benefit gas consumers because it reduces both the volume, and heat content, of the processed gas. *Area Rate Proceeding (Southern Louisiana Area)*, 40 F.P.C. 530, 611 (1968), aff'd, 428 F.2d 407 (5th Cir.), cert. denied 400 U.S. 950 (1970); *Northern Natural Gas Co.*, 28 F.P.C. 1155, 1158, 1163-1165 (1962), aff'd *sub nom. Mid-*

The First Use Tax is such a cost. It is imposed on activities which, in most cases, occur solely because the pipeline transports and delivers the gas stream to a processing plant so that the producers may separate and extract the liquid and liquefiable hydrocarbons contained in that stream. Thus, "the trans-

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American Pipe line Co. v. *FPC*, 330 F.2d 226, D.C. Cir. 1964).

Although the methodologies have differed, the Commission has applied the policy of requiring the owner of hydrocarbons to bear the cost of their extraction in establishing rates for producers as well as for pipelines. In establishing producer rates, the Commission has either credited revenues from the sale of the extracted hydrocarbons against costs, or allocated costs between the processed gas and the extracted hydrocarbons on the basis of economic and physical characteristics of the two products. *National Rates For Natural Gas*, Docket No. RM75-14, Opinion No. 770, 15 P.U.R. 4th 21, 49-50 (1976), reh. denied, Opinion No. 770-A, 17 P.U.R. 4th 317, 346-347 (1976), aff'd *sub nom. American Public Gas Association* v. *FPC*, 567 F.2d 1016 (D.C. Cir. 1977), cert. denied, 435 U.S. 907 (1978); *National Rates for Natural Gas*, 54 F.P.C. 3090, 3096-3102 (1975), reh. denied, Opinion No. 749-C, 15 P.U.R. 4th 1, 12-14 (1976). In establishing rates for those pipelines which own the extracted hydrocarbons as well as the processed gas, the Commission has credited the revenues from the sales of the liquids against the pipeline's cost of service. *Kansas-Nebraska Natural Gas Company, Inc.*, 53 F.P.C. 1691, 1702-1703 (1975), reh. denied, 54 F.P.C. 923 (1975); *Panhandle Eastern Pipe Line Co.*, 25 F.P.C. 787, 797-798 (1961), remanded *sub nom. Panhandle Eastern Pipe Line Co.* v. *FPC*, 305 F.2d 763, 767-768 (D.C. Cir. 1962), cert. denied, 372 U.S. 916 (1963), aff'd on remand, 32 F.P.C. 636 (1964), aff'd per curiam, 348 F.2d 340 (D.C. Cir.), cert. denied, 382 U.S. 944 (1965); *Northern Natural Gas Co.*, 28 F.P.C. 1155, 1163-1165; *Tennessee Gas Transmission Co.*, 18 F.P.C. 428, 435 (1957); *id.* at 474-479 (Initial Decision).

portation in [Louisiana] of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility[,] * * * processing for the extraction of liquefiable component products or waste materials[,] * * * [and] treatment" [38] occur solely because the gas is delivered to a producer-owned processing plant. Moreover, the pipeline must "transfer * * * possession or relinquish[] control at a delivery point in [Louisiana]" (*ibid.*) at the inlet of the processing plant to enable the producers to process the gas. Since such activities benefit only the producers, the Commission must determine whether the producers or the pipelines' natural gas customers must bear the costs (including any taxes) incurred by the pipelines because of these activities.

Section 47:1303 C, however, seeks to preclude the Commission from classifying the First Use Tax as a cost associated with the extraction of hydrocarbons and requiring that it be recovered from those products. It does this by abrogating contracts which require the owners of the extracted hydrocarbons to reimburse the transporting interstate pipelines for costs allocated to transportation and processing of those products. This abrogation prohibits the interstate pipeline from obtaining reimbursement from the owner of the extracted hydrocarbons and requires the interstate pipeline to seek reimbursement, if at all, from subsequent purchasers of the processed gas. The practical effect of this provision is to shift the incidence of significant costs incurred primarily for the benefit of the owners of the extracted hydrocar-

[38] La. Rev. Stat. Ann. § 47:1302(8) (West Supp. 1979).

bons to the ulimate consumer of the processed gas without the prior approval of the Commission.

2. Section 47:1303 C also interfers with the Commission's authority to control the terms on which natural gas is transported in interstate commerce through the issuance of certificates of public convenience and necessity under Section 7 of the Natural Gas Act (15 U.S.C. 717f). Interstate pipelines transport liquid and liquefiable hydrocarbons for the producers as well as natural gas onshore to a processing plant where the former are extracted by the producer and the residue gas returned to the pipeline.[39] Many contracts for this transportation service require the owner of the extractable hydrocarbons to reimburse the pipeline for all costs (including any taxes) incurred by, or levied against, the pipeline as a result of this transportation or the processing of the gas to extract the hydrocarbon products. Thus, the contracts require the producers to bear all costs asso-

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[39] *Area Rate Proceeding (Southern Louisiana Area)*, 40 F.P.C. 530, 611 (1968); *Tennessee Gas Pipeline Co., et al.*, 38 F.P.C. 691, 725, 737 (1967) (Initial Decision); *Continental Oil Co., et al.*, 27 F.P.C. 96, 149-150 (1962) (Initial Decision); *Hearings on H.R. 768 Before the Revenue and Fiscal Affairs Committee of the Louisiana Senate*, 14 (Mr. Slaton) (1978); *Hearings on H.R. 768 Before the Committee on Ways and Means of the Louisiana House of Representatives*, 9 (Mr. Brooksher) (Hearing of June 6, 1978).

In some cases, the producer transports the gas onshore for processing. *E.g., Gulf Oil Corporation*, Docket No. CI77-635 (July 29, 1977), petition for review pending, *Gulf Oil Corporation* v. *Federal Energy Regulatory Commission*, No. 77-2137 (D.C. Cir.); *Sabine Pipe Line Company and Texaco Inc.*, Docket Nos. CP77-304 and CI74-537 (July 7, 14, & 26, 1977).

ciated with transporting and extracting the liquid and liquefiable hydrocarbons.[40]

These contracts form the basis of the certificates authorizing these transportation services. See, *e.g.*, *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 387 (1959). In issuing certificates for such transportation, the Commission has, at a minimum, required that costs be allocated to that service.[41] Furthermore, the Commission must approve any amendment to these contracts. The parties must give notice of any proposed changes in these contracts to the Commission (15 U.S.C. 717c(d)), which may suspend temporarily the operation of the amended contracts (15 U.S.C. 717c(e)) and deter-

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[40] *E.g.*, *Hearings on H.B. 768 Before the Revenue and Fiscal Affairs Committee of the Louisiana Senate*, 5 (Representative Tauzin), 14 (Mr. Slaton), 19 (Mr. Garner) (1978); *Hearings on H.B. 768 Before the Committee on Ways and Means of the Louisiana House of Representatives*, 9, 16 (Mr. Brooksher) (Hearing of June 6, 1978).

[41] *Union Oil Company of California, et al.*, Docket No. CI77-828, *et al.*, order at 7, 10-11 (Apr. 12, 1978); *Canadian Superior Oil (U.S.) Ltd., et al.*, Docket No. CI77-802 (Mar. 28, 1978); *High Island Offshore System*, Docket Nos. CP75-104, *et al.*, order at 10, 16-17, 18 (June 4, 1976); *Tennessee Gas Pipeline Co., et al.*, 38 F.P.C. 691, 698 (1967); *Northern Natural Gas Co.*, 28 F.P.C. 1155, 1163-1165 (1962), aff'd *sub nom. Mid-America Pipeline Co.* v. *FPC*, 330 F.2d 226 (D.C. Cir. 1964); *Continental Oil Co., et al.*, 27 F.P.C. 96, 107-108 (1962); *Texas Eastern Transmission Corporation*, 11 F.P.C. 435, 447 (1952). *See also Pipeline Costs Allocable To The Transportation Of Liquids, Liquefiable Hydrocarbons, etc., For Others*, 47 F.P.C. 208 (1972), rev'd on other grounds *sub nom. Mobil Oil Corp.* v. *FPC*, 483 F.2d 1238 (D.C. Cir. 1973).

mine the terms of the amended contracts (15 U.S.C. 717d(a)). This procedure is within the exclusive jurisdiction of the Commission and may not be circumvented by states seeking to exercise control over such matters. *Northern Natural Gas Co.* v. *Kansas Commission*, 372 U.S. 84, 96-98 (1963); *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 506-509 (1942); *cf. United Gas Pipe Line Co.* v. *McCombs*, No. 78-17 (June 18, 1979). Thus, only the Commission may authorize deletion of the reimbursement provisions from contracts which are part of the certificates.

Section 47:1303 C, however, abrogates those provisions. It requires that the owner of the gas (rather than the owner of the extractable hydrocarbons) bear the cost of the tax. In doing so, it modifies certificates issued by the Commission and thereby invades the exclusive jurisdiction of the Commission.

3. Finally, Section 47:1303 C interferes with the regulation prescribed by the Natural Gas Policy Act in two distinct ways. First, it interferes with the Commission's authority under Section 110(a)(2), to determine whether, when a producer transports and processes OCS and federal enclave gas prior to selling it in a first sale, he should be allowed to increase the maximum lawful prices for such first sales to recover the First Use Tax from purchasers of the gas or whether he must recover the First Use Tax from other persons. Second, the Louisiana tax statute attempts to regulate aspects of first sales of "high-cost natural gas" produced on the OCS which Congress has directed are to be free of federal as well as state regulation.

a. Under Section 110(a)(2) of the NGPA, a person making a "first sale" of natural gas may increase the maximum lawful price for such first sale to recover costs incurred in "compressing, gathering, processing, treating, * * * or transporting * * * natural gas, or other similar costs," only if the Commission first authorizes such recovery. See H.R. Rep. No. 95-1752, 95th Cong., 2d Sess. 91 (1978).

Where a producer transports and processes OCS and federal enclave gas prior to selling it in a first sale, he incurs the First Use Tax because he is the owner of the gas when the taxable uses occur (see La. Rev. Stat. Ann. § 47:1302(9) (West Supp. 1979) (Mot. App. 4a)) and performs the taxable uses, namely the transportation of unprocessed gas to the inlet of a processing plant and the processing and treatment of the gas to extract liquid and liquefiable hydrocarbons and waste materials (see § 47:1302(8)), and because First Use Tax is "deemed a cost associated with uses made by the owner in preparation of [*sic*] marketing of the natural gas" (§ 47:1303 C) (Mot. App. 5a)). In those cases, the First Use Tax is subject to recovery through an increase in maximum lawful prices pursuant to Section 110(a)(2) of the NGPA because it is a cost "of compressing, gathering, processing, treating, * * * or transporting such natural gas * * * borne by the seller * * *." Thus, the maximum lawful prices for first sales of such natural gas subject to the First Use Tax may be increased to recoup that tax only if first authorized by the Commission.

Section 47:1303 C, however, interferes with the exercise of that authority. As previously noted, it abrogates provisions of contracts and agreements which permit the producer-owner of the gas to such reimbursement for the tax from persons other than subsequent purchasers of the processed natural gas. By requiring that the tax be passed along, if at all, only to natural gas customers, Section 47:1303 C conflicts with the provisions of Section 110(a)(2) of the NGPA which authorize the Commission to determine whether the maximum lawful prices prescribed in the NGPA should be increased to permit recovery of the First Use Tax, or whether the producer must look to persons other than natural gas consumers to reimburse him for the tax.

b. Moreover, Section 47:1303 C attempts to regulate the apportionment of costs in certain "first sales" of natural gas which Congress has directed are to be free of federal and state regulation. Section 121(b) of the Natural Gas Policy Act generally provides that the price ceilings prescribed in the Act for first sales of "high cost natural gas" [42] shall cease to apply to such first sales. This provision became effective upon the implementation of the incremental pricing provisions of the Act on November 1, 1979.[43]

Such first sales of natural gas in interstate commerce are now free of federal regulation. In addition,

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[42] Section 107, 92 Stat. 3366-3367.

[43] *Regulations Implementing the Incremental Pricing Provisions of the Natural Gas Policy Act of 1978*, Order No. 49, 44 Fed. Reg. 57726. (1979).

to the extent that "high-cost natural gas" is produced on the OCS, it is also free from any state regulation under Section 602(a) of the NGPA (92 Stat. 3411), which authorizes the states to prescribe maximum lawful prices for first sales of natural gas "produced in such State" that are lower than the maximum lawful prices prescribed in the NGPA. Because the OCS "*is located outside the borders of any state*" (*Continental Oil Co.* v. *Federal Power Commission*, *supra*, 370 F.2d at 67), Louisiana may not regulate sales of "high-cost natural gas" from that area since such gas is not produced in Louisiana.

In the absence of congressional authorization to do so, the states have no constitutional power to regulate the price of wholesales of natural gas in interstate commerce (*Missouri* v. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924); *cf. Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927) or to establish the terms on which such gas could be transported in interstate commerce. Cf. *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923) (states may not require gas companies serving both interstate and intrastate consumers to serve intrastate consumers prior to serving interstate consumers). Accordingly, since Section 47:1303 C seeks to regulate the apportionment of costs between the seller and buyer of "high-cost natural gas," which is produced from the OCS, it seeks to regulate transactions which this Court has held that the states may not regulate and which Congress has required to be free of federal as well as state regulation.

In light of the foregoing, it is clear that Section 47:1303 C trenches upon "matters which directly affect the ability of the [Commission] to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which [is] an objective of the Natural Gas Act [and the Natural Gas Policy Act]." *Northern Natural Gas Co.* v. *Kansas Comm'n, supra*, 372 U.S. at 91-92. By providing that the First Use Tax can only be passed on only to natural gas consumers, Section 47:1303 C, "seriously impair[s] the [Commission's] authority to regulate the intricate relationship between the [pipeline] purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other states" (372 U.S. at 92). Since regulation of "[t]his relationship is a matter with respect to which Congress has given the [Commission] paramount and exclusive authority[,]" Section 47:1303 C should be "declared a nullity in order to assure the effectuation of the [regulatory scheme] ordained by Congress" (372 U.S. at 92).

II. THE LOUISIANA FIRST USE TAX IS INVALID UNDER THE COMMERCE CLAUSE

Article I, Section 8, Clause 3 of the Constitution provides that: "Congress shall have power * * * to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." As the Court observed in *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944), "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States." It is settled by the

decisions of this Court that "the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. * * * [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946). See also *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 328 (1977).

The Commerce Clause flatly prohibits state taxation of goods that are merely in transit through the state when the tax is assessed. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954); *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 290 n. 11 (1976). Moreover, to the extent the goods come to rest and the tax can be said to reach a local activity, it is valid only where it is applied to activities having a substantial nexus with the state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state. See, *e.g.*, *Washington Rev. Dept.* v. *Stevedoring Assn.*, 435 U.S. 734, 750 (1978); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). The Louisiana First Use Tax contravenes the Commerce Clause in both respects.

A. The First Use Tax is imposed upon gas that is in transit through Louisiana in interstate commerce. While the tax is characterized as "upon the privilege of performance or allowing the performance by the owner, of the enumerated actions comprising first use

within [Louisiana]" (La. Rev. Stat. Ann. § 47:1303 E (West Supp. 1979) (Mot. App. 6a), provisions of the Act demonstrate that the tax falls on the transportation of the natural gas within Louisiana, not the privilege of use.[44]

As we have pointed out (pages 6-7, *supra*, "[t]he tax imposed * * * shall be computed at a rate of seven cents on each unit of natural gas as to which a use first occurs within [Louisiana]" and the term "unit" is defined as "one thousand cubic feet of natural gas" measured at a specified pressure and temperature (La. Rev. Stat. Ann. § 47:1303 B (West Supp. 1979) (Mot. App. 5a)). But such a levy is no different than a tax imposed "at the rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered" at the outlet of a processing plant that this Court struck down in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, *supra*, 347 U.S. 161. There, Texas levied a tax on the production of natural gas measured by the entire volume of gas to be shipped in interstate commerce. A refinery extracted the gas from crude oil and transported it 300 yards to the pipeline. Like Louisiana, the State identified, as a local incident, the transfer of gas from the refinery to the pipeline. The Court held the tax to be unconstitutional under the

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[44] "Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted" *Carpenter* v. *Shaw*, 280 U.S. 363, 367-368 (1930). See also *Society for Savings* v. *Bowers*, 349 U.S. 143, 150 (1955); *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 280 (1932).

Commerce Clause because it was an unapportioned levy on the transportation of the entire volume of gas. The exaction did not relate to the length of the Texas portion of the pipeline or the percentage of the taxpayer's business that was attributable to Texas. In these circumstances, the Court ruled that the Texas tax could not survive attack under the Commerce Clause.

In our view, *Michigan-Wisconsin Pipe Line Co.* controls the Commerce Clause aspects of this case. Stripped to its essentials, the Louisiana tax is simply a transit fee on the privilege of moving gas through the state. It is unrelated to the actual consumption of the gas within the state. Indeed, to the extent that gas subject to tax comes to rest and is consumed within the state, there are credits that are available to offset other Louisiana taxes payable by the users. Nor does the tax bear any reasonable relationship to the transporter's business within Louisiana. It is nothing more than an "unapportioned levy on the transportation of the entire volume of gas" (*Wash. Rev. Dept.* v. *Stevedoring Ass'n, supra*, 435 U.S. at 749 n. 18) and therefore invalid under the Commerce Clause.

B. Even if the Louisiana First Use Tax is not simply a transit levy on gas moving in interstate commerce, it is nevertheless invalid because it is not fairly apportioned and because it discriminates against interstate commerce.

1. A tax on interstate activities is properly apportioned if it is related to the value of identifiable

activities occurring within the taxing state (*Washington Rev. Dept.* v. *Stevedoring Ass'n, supra,* 435 U.S. at 746-747), the taxpayer's investment in facilities within the state (*Colonial Pipeline Co.* v. *Triagle,* 421 U.S. 100, 107 n. 5 (1975); *Memphis Natural Gas Co.* v. *Stone,* 335 U.S. 80, 81-82 nn. 1 & 2, 93 (1948) (Opinion of Reed, J.)), gross income from business conducted within the state (*Washington Rev. Dept.* v. *Stevedoring Assn, supra,* 435 U.S. at 737-738 and n. 4, 750; *Complete Auto Transit, Inc.* v. *Brady, supra,* 430 U.S. at 275), the percentage of the taxpayer's business in the state (*Washington Rev. Dept.* v. *Stevedoring Ass'n, supra,* 435 U.S. at 749 n. 18; *Case of the State Freight Tax,* 82 U.S. (15 Wall.) 232, 273, 278 (1872), or the length of the facilities or distance traveled within the state (*Norfolk & W.R. Co.* v. *Tax Comm'n,* 390 U.S. 317, 323-325 (1968)).

The First Use Tax is not related to any of these factors. Rather, it is imposed on the entire volume of OCS, federal enclave, and imported gas entering the state, except such gas as is consumed in certain uses within Louisiana. La. Rev. Stat. Ann. §§ 47: 1303 A, B (West Supp. 1979) (Mot. App. 4a-5a). The tax "is the same whether the [gas is] moved one mile or three hundred." *Case of the State Freight Tax,* 82 U.S. (15 Wall.) at 273. It is therefore simply "an unapportioned levy on the transportation of the entire volume of gas." *Washington Rev. Dept.* v. *Stevedoring Ass'n, supra,* 435 U.S. at 749 n.18.

Contrary to Louisiana's contention (Answer at 10, 12, ¶¶ XXXIV, XXXVII), the tax is not apportioned simply because it applies only if the gas is subjected to one of the enumerated uses. The Louisiana taxable "uses," like the taking of gas by a pipeline at the outlet of a processing plant, are inseparable elements of the interstate transmission of gas. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert, supra.* As the Court there stated, in terms that are strikingly appropriate to this case, there are "aspect[s] of interstate transportation [which] cannot be 'carve[d] out from what is an entire or integral economic process,' * * * by legislative whimsy and segregated as a basis for [a] tax" (347 U.S. at 169, quoting *Nippert* v. *Richmond,* 327 U.S. 416, 423 (1946)).

2. One of the unquestioned principles in this Court's Commerce Clause jurisprudence is that no state, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce * * * by providing a direct commercial advantage to local business" (*Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 457 (1959)). See also *Halliburton Oil Well Co.* v. *Reily,* 373 U.S. 64 (1963); *Nippert* v. *Richmond,* 327 U.S. 416 (1946); *I. M. Darnell & Son* v. *Memphis,* 208 U.S. 113 (1908); *Guy* v. *Baltimore,* 100 U.S. 434, 443 (1880); *Welton* v. *Missouri,* 91 U.S. 275 (1876). "The probation against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individ-

ual States to enact laws that favor local enterprises at the expense of out-of-state businesses 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects." *Boston Stock Exchange* v. *State Tax Comm'n, supra,* 429 U.S. at 329, quoting from *Dean Milk Co.* v. *Madison,* 340 U.S. 349, 356 (1951). The First Use Tax discriminates against interstate commerce in two distinct ways.

First, Louisiana has prohibited the purchasers of gas subject to the First Use Tax from shifting any or all of that tax to the producer. La. Rev. Stat. Ann. § 47:1303 C (West Supp. 1979), abrogates provisions of contracts that require persons other than purchasers of such gas to pay the First Use Tax. On the other hand, Louisiana does not prohibit purchasers of gas subject to its severance tax from shifting all or part of the tax to the producer. To the contrary, Louisiana permits the purchasers and sellers of such gas to determine, by contract, who shall bear that tax. La. Rev. Stat. Ann. § 47:633.1 (West Supp. 1979).

The practical effect of prohibiting the shifting of the First Use Tax while allowing the shifting of the severance tax is to impose a tax on OCS, federal enclave, and imported gas which is greater than the tax imposed on gas produced within Louisiana. As matters now stand, purchasers of gas produced in Louisiana, and sold in either interstate or intrastate commerce, can seek the advantage of the lower tax burden that is denied to interstate purchasers of the

gas subject to the First Use Tax. There is no constitutional warrant for such discriminatory treatment. *Boston Stock Exchange* v. *State Tax Commission*, *supra*, 429 U.S. at 333-336. "The conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated taxpayers is the condition precedent for a valid use tax on goods imported from out-of-state." *Halliburton Oil Well Co.* v. *Reily*, *supra*, 373 U.S. at 70.

The Louisiana First Use Tax also discriminates against interstate commerce by requiring out-of-state consumers to bear the entire burden of the levy. This discrimination is accomplished by a system of credits designed to ensure that Louisiana consumers are relieved of First Use Tax liability.

La. Rev. Stat. Ann. § 47:1303 A (West Supp. 1979) (Mot. App. 4a-5a),[45] provides that the First Use Tax shall not be levied against natural gas, otherwise subject to the tax, which is consumed in specified uses within Louisiana. However, natural gas subject to the tax which is consumed in identical uses in other states is not granted a similar exemption. So,

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[45] The First Use Tax does "not apply to natural gas otherwise subject [to the tax] * * * used or consumed in the drilling for or production of oil, natural gas, sulphur, or in the processing of natural gas for liquids extraction within the state; nor * * * to gas shrinkage volumes attributable to the extraction of ethane, propane, butanes natural or casinghead gasoline or other liquefied hydrocarbons * * *[;] nor * * * to natural gas used or consumed in the manufacture of fertilizer and anhydrous ammonia within the state." § 47:1303 A.

also, the related Severance Tax Credit [46] permits taxpayers liable for the First Use Tax to credit that liability, dollar-for-dollar, against their liability for Louisiana's severance tax on natural gas. As a result of this credit, Louisiana imposes a higher tax on those persons who do not pay Louisiana severance taxes than it does on those who do.[47] Thus, Louisiana businesses enjoy a distinct commercial advantage over their out-of-state competitors in the form of lower prices for natural gas.

Finally, Act No. 599 [48] allows every Louisiana electric generating plant, gas distribution service, and direct purchaser of natural gas from an interstate pipeline, to recoupt that portion of increased rates they pay for natural gas which is attributable to increased transportation and marketing costs for natural gas from the federal domain of the Outer Continental Shelf through direct credits against any tax or combination of taxes, other than severance taxes,

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[46] First Use Tax On Natural Gas—Severance Tax Credit, Act No. 436, 1978 La. Sess. Law Serv. 842 (West), La. Rev. Stat. Ann. § 47:647 (West Supp. 1979).

[47] This difference can be illustrated by the following example. Owner A has 1000 Mcf of OCS gas; Owner B has 500 Mcf of OCS gas and 500 Mcf of gas subject to Louisiana's severance tax. A owes $70 of first use tax; B owes $35 of first use tax and $35 in severance tax. B, however, pays only $35 in first use taxes. He owes no severance tax because he can credit the first use tax payment against his severance tax liability.

[48] Tax credit for electric and natural gas service, 1978 La. Sess. Law Serv. 1112 (West), codified as La. Rev. Stat. Ann. § 47:11 (West Supp. 1979).

owed to Louisiana. Since the First Use Tax is "deemed [to be] a cost associated with" the transportation and marketing of OCS, federal enclave, and imported natural gas (La. Rev. Stat. Ann. § 47:1303 C (West Supp. 1979) (Mot. App. 5a)), Louisiana consumers of such gas may effectively recoup the amounts attributable to that tax through a reduction in other state taxes. The legislative history indicates that the sole purpose of Act No. 599 is to ensure that Louisiana consumers do not incur any increased costs for natural gas as a result of the First Use Tax.[49]

In sum, the equivalence between the First Use Tax and the Severance Tax that Louisiana claims is illusory. Purchasers of gas subject to severance tax can shift the burden of the tax to the producer of gas but purchasers of gas subject to the "equivalent" First Use Tax cannot shift the burden of the levy. Moreover, the burden of the First Use Tax falls entirely on out-of-state consumers of gas. The Louisiana First Use Tax therefore "falls short of substantially even-handed treatment demanded by the Commerce Clause." *Boston Stock Exchange* v. *State Tax Comm'n*, *supra*, 429 U.S. at 332.

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[49] *Hearings on H.B. 786 Before the Commission on Ways and Means of the Louisiana House of Representatives*, *supra*, at 4 (Representative Tauzin and unidentified speakers), 5 (Colloquy between Representatives Sour and Bagert), 6 (Representative Laborde).

III. RESOLUTION OF THE QUESTIONS PRESENTED DOES NOT REQUIRE THE APPOINTMENT OF A SPECIAL MASTER

In light of the foregoing, we submit that there are no genuine issues as to any material facts that would require the appointment of a Special Master. Louisiana's pro forma denials of the material allegations of the complaint, its assertion "that many factual controversies have been raised by the pleadings," and its recitation of eight matters as to which it wishes to present evidence (Answer at 24-25 ¶ LXX), fail to establish that an evidentiary hearing is necessary to resolve the claims advanced in Plaintiff's Motion for Judgment on the Pleadings.

The initial question to be addressed in this case is whether the gas which is subject to the First Use Tax moves in interstate commerce when any of the enumerated taxable uses occur. As we have pointed out, the decisions of this Court establish beyond question as a matter of law that the gas moves in interstate commerce when the enumerated taxable uses occur. Once the interstate movement of the gas is recognized, plaintiff's claims under the Supremacy and Commerce Clauses can be resolved by testing the Louisiana tax statute under the decisions of this Court. Thus, contrary to Louisiana's assertion (Answer at 25 ¶ LXX, Item (7)), no evidence is required on these constitutional questions.

In sum, the claims presented in the Plaintiffs' Motion for Judgment on the Pleadings, present questions which can, and should, be resolved without the

the appointment of a Special Master.[50] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 307 (1966); *United States* v. *California*, 332 U.S. 19, 24 (1947); *United States* v. *Texas*, 339 U.S. 707, 712, 715; 720 (1950).

Finally, there is a compelling need for a prompt decision on the merits in this case. So long as the validity of the Louisiana tax remains unresolved, millions of natural gas consumers face the prolonged imposition of very substantial additional costs,[51] with little hope of recompense for the economic burdens imposed by such costs.[52]

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[50] As we have pointed out (*supra*, pages 30-31 and note 34), the disposition of one of plaintiff's claims may resolve the entire case. The plaintiffs allege (Br. at 9-10, 14-16, 20-24) and the United States and the Commission believe, that Section 47:1303C. La. Rev. Stat. Ann. § 47:1303 C (West Supp. 1979), which abrogates "[a]ny agreement or contract by which an owner of natural gas at the time a taxable use first occurs claims a right to reimbursement or refund of such taxes from any other party in interest, other than a purchase of such gas," directly conflicts with the Commission's authority to regulate interstate gas sales and transportation of natural gas. If Section 47:1303 C is invalid, the Louisiana statute provides that the First Use Tax "shall be null and void * * *" (§ 4(2), 1978 La. Sess. Law Serv. 486). Thus, a decision on this claim would be dispositive of the entire case.

[51] The First Use Tax will add approximately $225 million per year to the rates paid by natural gas consumers which receive gas subject to that tax. Br. at 7-8; Complt. 12; Brief for the United States and the Commission as Amici Curiae in support of the Motion for Leave to File at 3.

[52] The possibility of future refunds with interest provides, at best, inadequate compensation for the burdens imposed while the constitutionality of the tax is litigated. *Cf. FPC* v. *Hunt*, 376 U.S. 515, 524-525 (1964); *FPC* v. *Tennesese Gas Transmission Co.*, 371 U.S. 145, 154-155 (1962).

CONCLUSION

Plaintiff's motion for judgment on the pleadings should be granted.

Respectfully submitted.

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NOVEMBER 1979

APPENDIX A

Sections 4, 5, and 7 of the Natural Gas Act of 1938, 15 U.S.C. 717c, 717d and 717f, provide:

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the ju-

risdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas

company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions

pending before it and decide the same as speedily as possible.

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the effi-

cient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for

such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction,

extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of

property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

APPENDIX B

Sections 2, 110, 315 and 601 of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350, 3352, 3368, 3393, 3409, provide:

SEC. 2. DEFINITIONS

* * * * *

(18) COMMITTED OR DEDICATED TO INTERSTATE COMMERCE.—

(A) GENERAL RULE.—The term "committed or dedicated to interstate commerce", when used with respect to natural gas, means—

(i) natural gas which is from the Outer Continental Shelf; and

(ii) natural gas which, if sold, would be required to be sold in interstate commerce (within the meaning of the Natural Gas Act) under the terms of any contract, any certificate under the Natural Gas Act, or any provision of such Act.

(B) EXCLUSION.—Such term does not apply with respect to—

(i) natural gas sold in interstate commerce (within the meaning of the Natural Gas Act)—

(I) under section 6 of the Emergency Natural Gas Act of 1977;

(II) under any limited term certificate, granted pursuant to section 7 of the Natural Gas Act, which contains a pregrant of aban-

donment of service for such natural gas;

(III) under any emergency regulation under the second proviso of section 7(c) of the Natural Gas Act; or

(IV) to the user by the producer and transported under any certificate, granted pursuant to section 7(c) of the Natural Gas Act, if such certificate was specifically granted for the transportation of that natural gas for such user;

(ii) natural gas for which abandonment of service was granted before the date of enactment of this Act under section 7 of the Natural Gas Act; and

(iii) natural gas which, but for this clause, would be committed or dedicated to interstate commerce under subparagraph (A)(ii) by reason of the action of any person (including any successor in interest thereof, other than by means of any reversion of a leasehold interest), if on May 31, 1978—

(I) neither that person, nor any affiliate thereof, had any right to explore for, develop, produce, or sell such natural gas; and

(II) such natural gas was not being sold in interstate commerce (within the meaning of the Natural Gas Act) for resale (other than any sale described in clause (i)(I), (II), or (III)).

SEC. 110. TREATMENT OF STATE SEVERANCE TAXES AND CERTAIN PRODUCTION-RELATED COSTS.

(a) ALLOWANCE FOR STATE SEVERANCE TAXES AND CERTAIN PRODUCTION-RELATED COSTS.—Except as provided in subsection (b), a price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this subtitle if such first sale price exceeds the maximum lawful price to the extent necessary to recover—

(1) State severance taxes attributable to the production of such natural gas and borne by the seller, but only to the extent the amount of such taxes does not exceed the limitation of subsection (b); and

(2) any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission.

(b) LIMITATION ON STATE SEVERANCE TAXES.—The State severance tax allowable under subsection (a)(1) with respect to the production of any natural gas may not include any amount of State severance taxes borne by the seller which results from a provision of State law enacted on or after December 1, 1977, unless such provision of law is equally applicable to natural gas produced in such State and delivered in interstate commerce and to natural gas produced in such State and not so delivered.

(c) DEFINITION OF STATE SEVERANCE TAX.—For purposes of this section, the term "State severance tax" means any severance, production, or similar tax, fee, or other levy imposed on the production of natural gas—

(1) by any State or Indian tribe (as defined in section 106(b)(2)(B)(ii)); and

(2) by any political subdivision of a State if the authority to impose such tax, fee, or other levy is granted to such political subdivision under State law.

SEC. 121. ELIMINATION OF PRICE CONTROLS FOR CERTAIN NATURAL GAS SALES.

* * * * *

(b) HIGH-COST NATURAL GAS.—Effective beginning on the effective date of the incremental pricing rule required under section 201, the provisions of subtitle A respecting the maximum lawful price for the first sale of natural gas shall cease to apply to the first sale of high-cost natural gas which is described in section 107(c)(1), (2), (3), or (4).

* * * * *

SEC. 601. COORDINATION WITH THE NATURAL GAS ACT.

(a) JURISDICTION OF THE COMMISSION UNDER THE NATURAL GAS ACT.—

(1) SALES.—

(A) NATURAL GAS NOT COMMITTED OR DEDICATED.—For purposes of section 1(b) of the Natural Gas Act, effec-

tive on the first day of the first month beginning after the date of the enactment of this Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to natural gas which was not committed or dedicated to interstate commerce as of the day before the date of enactment of this Act solely by reason of any first sale of such natural gas.

(B) COMMITTED OR DEDICATED NATURAL GAS.—Effective beginning on the first day of the first month beginning after the date of the enactment of this Act, for purposes of section 1(b) of the Natural Gas Act, the provisions of such Act and the jurisdiction of the Commission under such Act shall not apply solely by reason of any first sale of natural gas which is committed or dedicated to interstate commerce as of the day before the date of the enactment of this Act and which is—

(i) high-cost natural gas (as defined in section 107(c)(1), (2), (3), or (4) of this Act);

(ii) new natural gas (as defined in section 102(c) of this Act); or

(iii) natural gas produced from any new, onshore production well (as defined in section 103(c) of this Act).

(C) AUTHORIZED SALES OR ASSIGNMENTS.—For purposes of section 1(b)

of the Natural Gas Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply by reason of any sale of natural gas—

(i) authorized under section 302 (a) or 311(b); or

(ii) pursuant to any assigned authorized under section 312(a).

(D) NATURAL-GAS COMPANY. — For purposes of the Natural Gas Act, the term "natural-gas company" (as defined in section 2(6) of such Act) shall not include any person by reason of, or with respect to, any sale of natural gas if the provisions of the Natural Gas Act and the jurisdiction of the Commission do not apply to such sale solely by reason of subparagraph (A), (B), or (C) of this paragraph.

(E) ALASKAN NATURAL GAS.—Subparagraph (B)(ii) and (iii) shall not apply with respect to natural gas produced from the Prudhoe Bay unit of Alaska and transported through the transportation system approved under the Alaska Natural Gas Transportation Act of 1976.

(2) TRANSPORTATION.—

(A) JURISDICTION OF THE COMMISSION.—For purposes of section 1(b) of the Natural Gas Act the provisions of such Act and the jurisdiction of the

Commission under such Act shall not apply to any transportation in interstate commerce of natural gas if such transportation is—

(i) pursuant to any order under section 302(c) or section 303 (b), (c), (d), or (h) of this Act; or

(ii) authorized by the Commission under section 311(a) of this Act.

(B) NATURAL-GAS COMPANY. — For purposes of the Natural Gas Act, the term "natural-gas company" (as defined in section 2(6) of such Act) shall not include any person by reason of, or with respect to, any transportation of natural gas if the provisions of the Natural Gas Act and the jurisdiction of the Commission under the Natural Gas Act do not apply to such transportation by reason of subparagraph (A) of this paragraph.

(b) CHARGES DEEMED JUST AND REASONABLE. —

(1) SALES.—

(A) FIRST SALES.—Subject to paragraph (4), for purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any first sale of natural gas shall be deemed to be just and reasonable if—

(i) such amount does not exceed the applicable maximum lawful price established under title I of this Act; or

(ii) there is no applicable maximum lawful price solely by reason of the elimination of price controls pursuant to subtitle B of title I of this Act.

(B) EMERGENCY SALES. — For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any sale authorized under section 302(a) shall be deemed to be just and reasonable if such amount does not exceed the fair and equitable price established under such section and applicable to such sale.

(C) SALES BY INTRASTATE PIPELINES.—For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any sale authorized by the Commission under section 311(b) shall be deemed to be just and reasonable if such amount does not exceed the fair and equitable price established by the Commission and applicable to such sale.

(D) ASSIGNMENTS.—For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid pursuant to the terms of any contract with respect to that portion of which the Commission has authorized an assignment authorized under section 312(a) shall be deemed to be just and reasonable if such amount does not exceed the appli-

cable maximum lawful price established under title I of this Act.

(E) AFFILIATED ENTITIES LIMITATION.—For purposes of paragraph (1), in the case of any first sale between any interstate pipeline and any affiliate of such pipeline, any amount paid in any first sale shall be deemed to be just and reasonable if, in addition to satisfying the requirements of such paragraph, such amount does not exceed the amount paid in comparable first sales between persons not affiliated with such interstate pipeline.

(2) OTHER CHARGES.—

(A) ALLOCATION.—For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid by any interstate pipeline for transportation, storage, delivery or other services provided pursuant to any order under section 303(b), (c), or (d) of this Act shall be deemed to be just and reasonable if such amount is prescribed by the President under section 303(h)(1).

(B) TRANSPORTATION. — For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid by any interstate pipeline for any transportation authorized by the Commission under section 311(a) of this Act shall be deemed to be just and reasonable if such amount does not exceed that ap-

proved by the Commission under such section.

(c) GUARANTEED PASSTHROUGH.—

(1) CERTIFICATE MAY NOT BE DENIED BASED UPON PRICE.—The Commission may not deny, or condition the grant of, any certificate under section 7 of the Natural Gas Act based upon the amount paid in any sale of natural gas, if such amount is deemed to be just and reasonable under subsection (b) of this section.

(2) RECOVERY OF JUST AND REASONABLE PRICES PAID.—For purposes of sections 4 and 5 of the Natural Gas Act, the Commission may not deny any interstate pipeline recovery of any amount paid with respect to any purchase of natural gas if—

(A) under subsection (b) of this section, such amount is deemed to be just and reasonable for purposes of sections 4 and 5 of such Act, and

(B) such recovery is not inconsistent with any requirement of any rule under section 201 (including any amendment under section 202),

except to the extent the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

MOTION OF

COLUMBIA GAS TRANSMISSION CORPORATION,
CONSOLIDATED GAS SUPPLY CORPORATION,
EL PASO NATURAL GAS COMPANY,
FLORIDA GAS TRANSMISSION COMPANY,
MICHIGAN WISCONSIN PIPE LINE COMPANY,

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MISSISSIPPI RIVER TRANSMISSION CORPORATION,
NATURAL GAS PIPELINE COMPANY OF AMERICA,
NORTHERN NATURAL GAS COMPANY,
PANHANDLE EASTERN PIPE LINE COMPANY,
SEA ROBIN PIPELINE COMPANY,
SOUTHERN NATURAL GAS COMPANY,
TENNESSEE GAS PIPELINE COMPANY
(a Division of Tenneco Inc.),
TEXAS EASTERN TRANSMISSION CORPORATION,
TEXAS GAS TRANSMISSION CORPORATION,
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
TRUNKLINE GAS COMPANY, and
UNITED GAS PIPE LINE COMPANY

FOR LEAVE TO INTERVENE AS PLAINTIFFS AND TO FILE COMPLAINT, BRIEF IN SUPPORT OF MOTION AND COMPLAINT OF INTERVENORS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

MOTION OF

COLUMBIA GAS TRANSMISSION CORPORATION,
CONSOLIDATED GAS SUPPLY CORPORATION,
EL PASO NATURAL GAS COMPANY,
FLORIDA GAS TRANSMISSION COMPANY,
MICHIGAN WISCONSIN PIPE LINE COMPANY,
MISSISSIPPI RIVER TRANSMISSION CORPORATION,

NATURAL GAS PIPELINE COMPANY OF AMERICA,
NORTHERN NATURAL GAS COMPANY,
PANHANDLE EASTERN PIPE LINE COMPANY,
SEA ROBIN PIPELINE COMPANY,
SOUTHERN NATURAL GAS COMPANY,
TENNESSEE GAS PIPELINE COMPANY
(a Division of Tenneco Inc.),
TEXAS EASTERN TRANSMISSION CORPORATION,
TEXAS GAS TRANSMISSION CORPORATION,
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
TRUNKLINE GAS COMPANY, and
UNITED GAS PIPE LINE COMPANY

FOR LEAVE TO INTERVENE AS PLAINTIFFS
AND TO FILE COMPLAINT

Columbia Gas Transmission Corporation, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Florida Gas Transmission Company, Michigan Wisconsin Pipe Line Company, Mississippi River Transmission Corporation, Natural Gas Pipeline Company of America, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Sea Robin Pipeline Company, Southern Natural Gas Company, Tennessee Gas Pipeline Company (a Division of Tenneco Inc.), Texas Eastern Transmission Corporation, Texas Gas Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, and United Gas Pipe Line Company [hereinafter "the pipeline companies"], by their undersigned attorneys, respectfully move the Court

(i) for leave to intervene as plaintiffs in this action pursuant to Rule 9(2) of the Court and the policy considerations underlying Rule 24 of the Federal Rules of Civil Procedure, and (ii) for leave to file a complaint to assert and protect their interests.

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IN THE

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STATE OF MARYLAND,
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COMMONWEALTH OF MASSACHUSETTS,
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STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
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STATE OF WISCONSIN,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

BRIEF OF

COLUMBIA GAS TRANSMISSION CORPORATION,
CONSOLIDATED GAS SUPPLY CORPORATION,
EL PASO NATURAL GAS COMPANY,
FLORIDA GAS TRANSMISSION COMPANY,

MICHIGAN WISCONSIN PIPE LINE COMPANY,
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NATURAL GAS PIPELINE COMPANY OF AMERICA,
NORTHERN NATURAL GAS COMPANY,
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SEA ROBIN PIPELINE COMPANY,
SOUTHERN NATURAL GAS COMPANY,
TENNESSEE GAS PIPELINE COMPANY
(a Division of Tenneco Inc.),
TEXAS EASTERN TRANSMISSION CORPORATION,
TEXAS GAS TRANSMISSION CORPORATION,
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
TRUNKLINE GAS COMPANY, and
UNITED GAS PIPE LINE COMPANY

IN SUPPORT OF MOTION

STATEMENT OF THE CASE

The States of Maryland, Illinois, Indiana, Massachusetts, Michigan, New York, Rhode Island and Wisconsin [hereinafter "plaintiffs"] have invoked the original jurisdiction of this Court in order to challenge the constitutionality of the Louisiana First Use Tax on Natural Gas, La. R.S. 47:1301-07 [hereinafter "First Use Tax"].[1] Plaintiffs pray, *inter alia*, for a judgment declaring the First Use Tax unconstitutional and for both preliminary and permanent injunctions prohibiting collection of the tax.

[1]The text of the First Use Tax is contained in Appendix C, *infra*, pages A-6—A-12.

The pipeline companies seeking to intervene are natural gas companies as defined in Section 2 of the Natural Gas Act, 15 U.S.C. 717 *et seq.*, and are regulated by the Federal Energy Regulatory Commission [hereinafter "FERC"] and, as to certain aspects of their business transactions, by state agencies.

The pipeline companies acquire natural gas produced from the outer continental shelf (a federal domain beyond the territorial boundaries of the State of Louisiana, defined and delineated in the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*) and from onshore federal enclaves lying within the boundaries of the State of Louisiana. The gas so acquired is natural gas upon which no severance tax or other tax upon the volume of production has been paid (or is legally due to be paid) to any state or territory of the United States, and upon which no import tax or tariff is imposed by the United States. The gas [hereinafter "said gas"] is thus deemed subject to the First Use Tax. La. R.S. 47:1303A.

The pipeline companies transport said gas through their own pipeline systems or have it transported through the pipeline systems of others into or through the State of Louisiana, in various streams in interstate commerce, for sale for resale under rate schedules or tariffs approved by and on file with FERC, to gas distribution companies, municipalities, and other pipelines, and/or for direct sale to other customers, all under certificates of public convenience and necessity issued by FERC. At all times when said gas is deemed to be subject to the First Use Tax it is traveling in interstate commerce.

Because the pipeline companies are the owners of said gas when the events defined as "uses" by the First Use Tax occur, they are legally responsible for paying the tax and complying with the reporting requirements of the First Use Tax statute. La. R.S. 47:1305.[2] The gas is subject to seizure and sale as contraband should they fail to do so. La. R.S. 47:1306B.

With the consent of the original parties, an *amici curiae* brief was filed by certain of the pipeline companies to apprise the Court of their vital and immediate interests in the outcome of this action, to support the plaintiffs' Motion For Leave To File Complaint, and to state the intention of the pipeline companies to intervene in the action upon the acceptance by this Court of jurisdiction. On June 18, 1979, the Court entered an order granting plaintiffs' Motion For Leave To File Complaint.

JURISDICTION

Original exclusive jurisdiction in this Court of the plaintiffs' action is established by article III, § 2, clauses 1 and 2 of the United States Constitution. Article III, § 2.

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[2]The pipeline companies are the taxpayers. Each has reported and made First Use Tax payments as required by La. R.S. 47:1305 for the months of April, May and June, 1979, and has filed suit for the recovery thereof, as well as for the recovery of all future First Use Taxes paid under protest, in the matter entitled Southern Natural Gas Co., *et al.* v. McNamara, *et al.*, No. 225-533 (19th Judicial District Court for the State of Louisiana, filed June 22, 1979).

clauses 1 and 2 of the United States Constitution also establish original jurisdiction in this Court of the Complaint of Intervenors herein.

REASONS FOR GRANTING INTERVENTION

While there is no express rule governing intervention in original actions in the Supreme Court, Rule 9(2) of this Court provides in part that ". . . the Federal Rules of Civil Procedure . . . where their application is appropriate, may be taken as a guide to original actions in this court." Rule 24 of the Federal Rules of Civil Procedure establishes the requirements for intervention in the District Courts.[3] As demonstrated below, the pipeline companies unquestionably satisfy the policy considerations underlying Rule 24 and thus should be permitted to intervene.

I. The Pipeline Companies Have Significantly Protectable Interests at Issue in This Case

The pipeline companies clearly have a "significantly protectable interest" in the matter at issue between the plaintiffs and the State of Louisiana. *See Donaldson v. United States*, 400 U.S. 517, 531 (1971). Considerations of justice and judicial economy require that they be allowed to intervene to protect that interest. Indeed, these are two of the principal reasons for permitting intervention, *viz*: "to foster economy of judicial administration and to protect nonparties from having their interests adversely affected by litigation conducted without their participation." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977).

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[3]The text of Rule 24 is contained in Appendix E, *infra*, pages A-15—A-16.

The natural gas that the pipeline companies acquire from the outer continental shelf and onshore federal enclaves purportedly is made subject to the First Use Tax by La. R.S. 47:1303, which imposes a tax upon the first "use" of the gas within the State of Louisiana, as that term is defined in La. R.S. 47:1302(8). Since the pipeline companies are the owners of the natural gas at the time the gas is subjected to events defined as "uses" by the First Use Tax statute, they are responsible for payment of the tax. La. R.S. 47:1305B.

In addition to the proprietary interest in the taxes that they already have paid and will continue to pay under protest to the State of Louisiana, an estimated $275,000,000 in the first year alone, the pipeline companies have a proprietary interest as owners of the natural gas that is the subject of the tax. If the pipeline companies do not comply with the obligations imposed upon them by the First Use Tax statute, the natural gas owned by them is subject to seizure and sale as contraband. La. R.S. 47:1306B. Interests in property, such as these, are the most elementary type of right that intervention was designed to protect. *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir.), *cert. den. sub nom. Trefina v. United States*, 400 U.S. 878 (1970).

As the taxpayers, the pipeline companies are required to comply with the complex reporting and payment procedures established by the First Use Tax. If they do not comply timely with the requirements of the statute, under La. R.S. 47:1306A, the pipeline companies will be subject to the assessment of interest, penalties and costs as provided in La. R.S. 47:1601–06, and under certain circumstances, attorneys fees as provided in La. R.S. 47:1512. *See South Central Bell Telephone Co. v. Traigle*, 367 So.2d 1143 (La. 1979). Furthermore, the pipeline

companies are required to pay the tax under protest in order to preserve the right to an ultimate refund. La. R.S. 47:1576.[4]

Because the "legal incidence" of the tax is upon the pipeline companies, they have a judicially recognized interest in having the First Use Tax declared unconstitutional. *Arizona v. New Mexico*, 425 U.S. 794, 797–98 (1976).

While it is true that the pipeline companies, under orders issued by FERC,[5] are presently collecting most of the costs associated with the First Use Tax from their customers, subject to refund with interest, and subject to the outcome of litigation challenging the constitutionality of the tax, the FERC orders do not provide complete protection of the pipeline companies' interests. It also is true that the interim collection procedures adopted by FERC do not lessen the critical and primary interest of the

[4]The text of La. R.S. 47:1576 is contained in Appendix D, *infra*, pages A-13—A-14.

[5]*See* State of Louisiana First Use Tax in Pipeline Rate Cases, FERC Docket No. RM78-23, Order No. 10, 43 Fed. Reg. 45553 (Oct. 3, 1978); Order No. 10-A, 43 Fed. Reg. 60438 (Dec. 28, 1978); Order No. 10-B, 44 Fed. Reg. 13460 (March 12, 1979); "Order Directing The Solicitor To Seek Either An Order Of The Court Permitting the Commission To Modify Its Orders Or A Remand Of the Record" and Proposed Order No. 10-C, 44 Fed. Reg. 46291 (August 7, 1979); "Order Accepting Certain Tariff Sheets, Conditionally Accepting Certain Tariff Sheets, and Rejecting Certain Other Tariff Sheets Which Reflect the Louisiana First Use Tax," Arkansas Louisiana Gas Co., *et al.*, FERC Docket Nos. RP79-53, *et al.*, 44 Fed. Reg. 21330 (April 10, 1979). These orders have placed and will place the pipeline companies at risk and the lawfulness of the procedures prescribed by such orders is being challenged in the United States Court of Appeals for the Fifth Circuit in Tennessee Gas Pipe Line Co., *et al.* v. FERC, No. 78-3816.

pipeline companies in having the tax declared unconstitutional.[6]

First, although FERC regulates the rates of sales for resale (sales to distribution companies, pipelines and municipalities), the ability of the pipeline companies to collect the First Use Tax from their direct sale customers (sales to persons for their own use) is generally governed by contract rather than FERC orders and regulations. In some instances, direct sale contracts contain no tax reimbursement provisions, while in others only a percentage of tax increases will be borne by the direct sale consumer. Accordingly, some of the pipeline companies may be required to bear at least a portion of the First Use Tax, if it is held to be constitutional.

Second, the FERC orders permitting the pipeline companies to collect the First Use Tax from their jurisdictional customers, expose the pipeline companies to economic risk, even if the tax ultimately is declared to be unconstitutional. Under these orders, if they are to collect the tax from their customers, the pipeline companies must engage in a corporate undertaking procedure which would require the pipeline companies, in the event the tax is declared to be unconstitutional, to absorb the loss of any taxes paid to the State of Louisiana, and/or associated costs, which for any reason are unrecoverable from the

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[6]In Southern Pacific Company v. Darnell-Taenzer Lumber Company, 245 U.S. 531 (1918), the Court held that a shipper had a right to maintain a suit for reparations before the ICC even though he had passed on the excess costs completely to his customers. In Ute Indian Tribe v. State Tax Commission, 574 F.2d 1007 (10th Cir. 1978), the Tenth Circuit recognized the right of the plaintiffs to seek to enjoin an allegedly invalid sales tax even though they were required by the taxing statute to collect the entire amount of the tax from their customers.

state.[7] Thus, the pipeline companies have a vital stake in the outcome of these proceedings.

Finally, the pipeline companies are required under the FERC orders[8] to take all legal action necessary to enforce contract provisions which could require another contracting party to pay the tax. As the FERC orders recognize, some contracts between the pipeline companies and producers or processors of gas could require the reimbursement of the First Use Tax. However, the First Use Tax provides that these contract provisions are unenforceable, "unless there has been a final and unappealable judicial determination" to the contrary. La. R.S. 47:1303C. As the contracting parties, the pipeline companies are directly affected by this clause and clearly have a vital interest in challenging the constitutionality of La. R.S. 47:1303C. Moreover, because of the conflict between the Louisiana statute and the FERC orders, the pipeline companies may have to bear the full cost of the tax attributable to gas obtained under such contracts pending

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[7]*See* State of Louisiana First Use Tax in Pipeline Rate Cases, FERC Docket No. RM78-23, Order No. 10-B, at 7-8, 44 Fed. Reg. 13460, at 13461 (March 12, 1979); Order No. 10-C, at 20, 44 Fed. Reg. 46291 at 46293 (August 7, 1979).

[8]*Id.*, Order No. 10-B, at 8-10, 44 Fed. Reg. at 13461-62.

a determination of the enforceability of the provisions in separate legal proceedings.[9]

II. Intervention of the Pipeline Companies Is Appropriate to Permit Their Participation in the Resolution of Issues Directly Affecting Their Interests

This Court's decision regarding the constitutionality of the First Use Tax will directly affect the obligations of the pipelines under the First Use Tax, the FERC orders and the contracts between the pipeline companies and their customers and suppliers. Therefore, the pipeline companies should be allowed to speak for themselves regarding their interests. *See, e.g., Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977); *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967); *Atlantis Development Corp. v. United States*, 379 F.2d 818 (5th Cir. 1967); *Hartford Accident & Indemnity Co. v. Crider*, 58 F.R.D. 15 (N.D. Ill. 1973). It also is clear that the decision of this Court will have a dispositive effect on the constitutional issues affecting the pipeline companies' interests which they have raised in other proceedings.[10] Refusal to permit their

[9]In FERC's brief in FERC v. McNamara, No. 79-1403, (5th Cir. 1979), the following statement was made at page 13:

> Insofar as it requires the purchaser to bear, and to pass through, if at all, to subsequent purchasers of the gas, the cost of the First Use Tax, Section 47:1303(C) trenches upon the Commission's exclusive authority to determine whether the purchaser or seller of natural gas should bear certain costs (including taxes) associated with the transportation or sale of natural gas in interstate or foreign commerce, and whether, when the costs (including taxes) are incurred as a result of processing to extract natural gas liquids, those costs must be recovered, if at all, in the sales prices for the natural gas liquids products extracted.

[10]*See* note 2, *supra*.

intervention will prevent the pipeline companies from participating in the resolution of those issues, and from litigating additional constitutional issues particularly affecting their interests. *See, e.g.*, discussion at pp. 19-21, *infra.*

The practical impairment of the ability of the pipeline companies to protect their interests, absent their participation in this case, and the critical need to permit them to speak for themselves, is best illustrated by examining the nature of the relief sought by plaintiffs. If this Court were, for example, to consider granting preliminary injunctive relief, it should permit the pipeline companies to assist the Court in fashioning any such relief because of the enormous sums involved and the severe adverse impact the pipeline companies could suffer if such relief were granted without their participation.

Until declared unconstitutional, the First Use Tax is a valid item of cost which must be included in a pipeline company's cost-of-service. Should a preliminary injunction be issued, the State of Louisiana would be prohibited from collecting the tax currently from the pipeline companies and, under the terms of the FERC orders, the pipeline companies would be prohibited from collecting from their customers amounts sufficient to pay the tax currently.[11]

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[11]In Order No. 10, FERC made the following statement:

> Should the collection of the tax be enjoined by the courts during the entire period the validity of the tax is pending in court, no collection of such amounts by pipelines in their jurisdictional rates would be permitted by this Commission until such time as the tax is found to be lawful by a final and nonappealable court order. In that event, the pipelines shall keep account of their contingent tax liability during the pendency of court review. Appropriate rate relief will

[footnote continued on next page]

If the preliminary injunction were later dissolved because this Court determines that the First Use Tax is in whole or in part constitutional, the pipeline companies will be obligated to pay the First Use Tax to the State of Louisiana retroactively from the effective date of the injunction. This payment would require coordination of payments of the tax to the State of Louisiana with the collection of rates from the customers of the pipeline companies in order to avoid enormous financing charges incurred as a result of the necessity to borrow funds sufficient to discharge the pipeline companies' obligation to the State of Louisiana. Not only might the absence of the necessary coordination subject some pipeline companies to financial strain, but the heavy financing costs incurred to borrow funds to make the lump sum payment would necessitate additional increases to their rates.

The pipeline companies could thus be exposed to a potentially enormous, immediate liability for the accrued unpaid taxes, as well as the possibility of interest, penalties, costs and attorneys fees,[12] and should be in a position to participate in the framing of any injunctive relief.

These practical considerations demonstrate the substantial proprietary and other interests of the pipeline companies which may be adversely affected unless they are permitted to intervene.

[footnote continued from previous page]

be granted if the tax is ultimately held to be valid and constitutional.

State of Louisiana First Use Tax in Pipeline Rate Cases, FERC Docket No. RM78-23, Order No. 10, at 2, 43 Fed. Reg. 45553 (Oct. 3, 1978). Although FERC has represented that it will grant "appropriate rate relief," the nature and timing of this relief has not been specified.

[12] *See* page 12, *supra.*

III. Intervention by Pipeline Companies is Necessary in Order that Their Interests be Adequately Represented

The pipeline companies' interests are not adequately represented by plaintiffs. As stated in *Trbovich v. United Mine Workers of America,* 404 U.S. 528, 538, n. 10 (1972), intervention should be allowed:

> if the applicant shows that representation of his interest "may be" inadequate; and the burden of making that showing should be treated as minimal. See 3B J. ¶ 24.09-1[4] (1969).

Accord Hodgson v. United Mine Workers of America, 473 F.2d 118, 130 (D.C. Cir. 1972). In *Trbovich*, an intervention by members of a union was allowed in a suit instituted by the Secretary of Labor. The Court recognized that the Secretary was under a statutory obligation to represent the interests of the union members but also acknowledged that the Secretary's additional and broader duty to the public was distinct from the interests of the complaining union members, and on this basis recognized the right of the complaining union members to intervene.

The pipeline companies represent additional, distinct and in certain respects broader interests than do plaintiffs. Certain aspects of the First Use Tax affect particularly the interests of the taxpaying pipeline companies. The "nullification clause" contained in the First Use Tax, La. R.S. 47:1303C, which seeks to abrogate pre-existing contractual relationships between the pipeline companies and their suppliers, directly affects the rights of only the pipeline companies under the contracts. In contrast, the plaintiffs' concern with that clause is based on the effect of the proposed abrogation upon the rates which they and their citizens are charged for the gas by certain of the pipeline companies.

It is the pipeline companies, as taxpayers, who are denied equal protection of the laws as a result of the combined effect of the First Use Tax and the Severance Tax Credit Act, La. R.S. 47:647.[13] This differs from the interest of the plaintiffs which are concerned with the economic effect of these combined provisions upon the pipeline companies' rates to their customers.

Certainly, the pipeline companies can be expected to represent their own distinct economic interests (*See, e.g.*, discussion at pp. 16-18, *supra*) more vigorously than the plaintiffs. *New York Public Interest Research Group, Inc. v. Regents of the University of the State of New York*, 516 F.2d 350 (2d Cir. 1975). *See also Holmes v. Government of the Virgin Islands*, 61 F.R.D. 3 (D. St. Croix 1973).

If in *Trbovich* the interests of an intervenor were held by this Court to be not adequately represented by a party who, while admittedly representing the same interests, also represented additional and different interests, the pipeline companies here have certainly met the "minimal" showing that representation of their interests may be inadequate. Since the interests of the pipeline companies are broader than and only partly coincident with those of plaintiffs, intervention should be allowed.

Moreover, the plaintiffs' attack on the First Use Tax is aimed at the application of the tax to natural gas passing through Louisiana in transit to other states. Plaintiff's Brief In Support Of Motion For Leave To File Complaint, at 19–20. In contrast, the pipeline companies contend that the First Use Tax also is unconstitutional as applied to gas transported from the offshore and onshore federal domains and sold and consumed in Louisiana. The pipeline companies strongly urge that the First Use Tax is

[13]The text of the Severance Tax Credit Act is contained in Appendix B, *infra*, pages A-3—A-5.

unconstitutional *in toto*, and that none of the "uses" to which it applies is taxable, whether or not the gas ever leaves Louisiana.

There is no doubt that gas transported from the offshore and onshore federal domains into Louisiana is being transported in interstate commerce even though it is sold in Louisiana. *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 369 (1965). Moreover, as to gas sold in Louisiana, the impact of the First Use Tax would not and could not be limited to Louisiana because much of the gas sold in Louisiana thereafter is transported in interstate commerce to other states. Also, the tax paid on gas sold and consumed in Louisiana in most instances becomes a part of total systemwide gas cost to be borne by all customers of each taxpaying pipeline company, whether such customer is located in Louisiana or some other state. Thus, even when the gas never leaves Louisiana, the First Use Tax adversely impacts and discriminates against interstate commerce.

Finally, while the pipeline companies believe that this case can be and should be disposed of summarily, the court may conclude that full factual development is needed. If it does so, it is submitted that the pipeline companies have a superior ability to marshal the facts which may be required to be shown in order to demonstrate that the tax is unconstitutional. *See, e.g. complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). When a party to the action does not have access to relevant facts available to an intervenor, that party may be unable to represent the intervenor adequately. *National Farm Lines v. Interstate Commerce Commission*, 564 F.2d 381 (10th Cir. 1977); *Atlantic Refining Co. v. Standard Oil Co.*, 304 F.2d 387 (D.C. Cir. 1962); *General Motors Corp.*

v. Burns, 50 F.R.D. 401 (D. Hawaii 1970). More specifically, the pipeline companies have full knowledge of, direct access to, and intimate familiarity with the gas supply, engineering, economic, accounting and environmental data which the court may determine is necessary for determinations relating to the constitutionality of the First Use Tax as a taxing measure.

The pipeline companies respectfully submit that their presence will not retard, but rather will promote, the progress of the litigation, since they will aid in the complete presentation, particularly of the issues and in the proper and expeditious resolution of the controversy. *See United States v. Reserve Mining Co.,* 56 F.R.D. 408 (D. Minn. 1972). The facts which the Court may conclude are pertinent including the volume and source of the gas taxed, its transmission, its "use" and its destination—are in the possession of the pipeline companies. The practical operation and economic effect of the tax cannot be evaluated in the absence of the pipeline companies. Intervention should be permitted when the "parties seeking intervention will significantly contribute to full development of the underlying factual issues of the case." *Spangler v. Pasadena City Bd of Ed.,* 552 F.2d 1326, 1329 (9th Cir. 1977), *citing Hines v. Rapides Parish School Bd,* 479 F.2d 762, 765 (5th Cir. 1973).

IV. This Court's Decisions Support Granting Intervention

This Court has granted intervention in actions between states where the intervenor claimed a distinct interest that would be affected by the action. *See, e.g., Oklahoma v. Texas,* 252 U.S. 372 (1920) (intervention by United States); *Oklahoma v. Texas,* 258 U.S. 574 (1922) (intervention by private parties); *Texas v. New Jersey,* 379

U.S. 674 (1965) (intervention by a state); *Texas v. Louisiana*, 426 U.S. 465 (1976) (intervention by a city).

In *Utah v. United States*, 394 U.S. 89 (1969), a private party was denied leave to intervene, but only because a stipulation had been entered between the original parties that limited the issues before this Court to such an extent that the intervenor's only remaining interest in the case was identical to that of an existing party. This Court noted, however, that absent the stipulation, the intervention "would have had a substantial basis" and that it would have seemed "fairest" to permit the intervenor "to speak for itself." 394 U.S. at 92.

The pipeline companies have demonstrated that they have significantly protectable interests that will be impaired by an adverse decision in this action and that their interests are not adequately represented by any of the existing parties. This is exactly the type of situation contemplated by this Court in *Utah*. As in that case, here also it would be "fairest" to permit the intervening parties to speak for themselves regarding their paramount interests.

CONCLUSION

It is respectfully submitted that the Motion for Leave to Intervene should be granted and that the pipeline companies should be allowed to file their complaint.

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and Trunkline Gas Company

COMPLAINT OF INTERVENORS

Columbia Gas Transmission Corporation, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Florida Gas Transmission Company, Michigan Wisconsin Pipe Line Company, Mississippi River Transmission Corporation, Natural Gas Pipeline Company of America, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Sea Robin Pipeline Company, Southern Natural Gas Company, Tennessee Gas Pipeline Company (a Division of Tenneco Inc.), Texas Eastern Transmission Corporation, Texas Gas Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, and United Gas Pipe Line Company (hereinafter "Intervenors"), complain and allege as follows:

JURISDICTION AND STANDING

1. Intervenors seek leave to file this Complaint in Intervention pursuant to article III, § 2, clauses 1 and 2 of the Constitution of the United States ("Controversies . . . between a State and Citizens of another State"); Rule 9 of this Court; and Rule 24 of the Federal Rules of Civil Procedure.

2. The original complaint filed herein by plaintiffs seeks a declaratory judgment, pursuant to 28 U.S.C. 2201–02, that the State of Louisiana's First Use Tax on Natural Gas, La. R.S. 47:1301–07 [hereinafter "First Use Tax"] (the text of the First Use Tax is contained in Appendix C, *infra,* pages A-6—A-12), violates the rights and

protections afforded to plaintiffs by the United States Constitution under article I, § 8, clause 3 (Commerce Clause); article I, § 10, clause 1 (Impairment of Contracts Clause) and clause 2 (Import-Export Clause); and article VI, clause 2 (Supremacy Clause); and denies to plaintiffs the equal protection of the laws guaranteed by the Fourteenth Amendment. The complaint also seeks preliminary and permanent injunctions against the enforcement and collection of the First Use Tax, and an order that all revenues collected pursuant thereto be refunded to the taxpayers together with interest thereon.

3. The activities and operations of each Intervenor make it liable for the taxes imposed by the First Use Tax statute. Intervenors have a significant and direct interest in the outcome of this lawsuit and intervene as plaintiffs seeking a declaration of invalidity and unconstitutionality of the First Use Tax for the reasons set forth herein.

4. Each Intervenor is a "natural gas company" as defined in Section 2 of the Natural Gas Act, 15 U.S.C. 717 *et seq.*, and is regulated by the Federal Energy Regulatory Commission [hereinafter "FERC"].

5. The First Use Tax statute purports to impose a tax "upon the first occurrence within this state of any use . . . of any natural gas upon which no severance tax or tax upon the volume of production has been paid, or is legally due to be paid, to this state or any other state or territory of the United States, or which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country." La. R.S. 47:1303A.

6. Each Intervenor acquires natural gas produced from the Outer Continental Shelf (a federal domain beyond the territorial boundaries of the State of Louisiana, which is defined and delineated in the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*) and from onshore federal enclaves lying within the boundaries of the State of Louisiana, upon which no severance tax or tax upon the volume of production has been paid, or is legally due to be paid, to Louisiana or to any other state or territory of the United States, and upon which no import tax or tariff is imposed by the United States [hereinafter "said gas"].

7. Each Intervenor transports said gas through its own pipeline system or has said gas transported through the pipeline systems of others into or through the State of Louisiana, in various streams in interstate commerce, for sale for resale under rate schedules or tariffs approved by and on file with FERC to gas distribution companies, municipalities, and other pipelines, and/or for direct sale to other customers, all under certificates of public convenience and necessity issued by FERC. With some variation from stream to stream, said gas while traveling in interstate commerce is subjected to some or all of the purported uses set out in the First Use Tax statute.

8. During the months of April, May and June 1979, each Intervenor was the "owner" of said gas at the time of the first occurrence within Louisiana of an event defined as a "use" by La. R.S. 47:1302(8), and each Intervenor therefore was required to report the tax imposed upon said gas by the First Use Tax statute and rules and regulations promulgated pursuant thereto.

9. The First Use Tax statute requires that each Intervenor file statements with the Louisiana Department of Revenue and Taxation each month following any month in which a "first use" occurs and that the First Use Taxes purportedly due on volumes of gas reported in said statements be paid monthly. La. R.S. 47:1305. Each Intervenor properly reported and, pursuant to La. R.S. 47:1576, paid under protest the full amount of the First Use Tax purportedly due for the months of April, May and June 1979, on gas owned by each of them. (The text of La. R.S. 47:1576 is contained in Appendix D, *infra,* pages A-13—A-14.) Each Intervenor will own gas which will be subjected to a "first use" in months subsequent to June 1979, and will pay under protest the amount of First Use Tax purportedly due for each such month.

10. Each Intervenor timely instituted suit against Shirley McNamara, Secretary of the Louisiana Department of Revenue and Taxation, the Louisiana Department of Revenue and Taxation, and the State of Louisiana, in the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana, No. 225-533, Division "D," to recover First Use Taxes paid under protest for the month of April 1979, and to recover all First Use Tax payments for succeeding months, imposed pursuant to La. R.S. 47:1301 *et seq.*, and paid by each Intervenor under protest pursuant to La. R.S. 47:1576.

DESCRIPTION OF THE PARTIES

11. Each of the following Intervenors is a corporation duly authorized to do business and actually doing business

in the State of Louisiana, being incorporated under the laws of, and having its principal place of business in, the state shown beneath its respective name:

Southern Natural Gas Company
State in which incorporated: Delaware
Principal place of business: 1st National Southern Natural Building, Birmingham, Alabama 35203

Transcontinental Gas Pipe Line Corporation
State in which incorporated: Delaware
Principal place of business: 2700 S. Post Oak Road, Houston, Texas 77056

Columbia Gas Transmission Corporation
State in which incorporated: Delaware
Principal place of business: 1700 MacCorkle Avenue, Charleston, West Virginia 25314

Tennessee Gas Pipeline Company, a Division of Tenneco Inc.
State in which incorporated: Delaware
Principal place of business: 1010 Milam Street, Houston, Texas 77001

Texas Eastern Transmission Corporation
State in which incorporated: Delaware
Principal place of business: 1 Houston Center, Houston, Texas 77002

Florida Gas Transmission Company
State in which incorporated: Delaware
Principal place of business: 1560 Orange Avenue, Winter Park, Florida 32790

Michigan Wisconsin Pipe Line Company
State in which incorporated: Delaware
Principal place of business: One Woodward Avenue, Detroit, Michigan 48226

Natural Gas Pipeline Company of America

State in which incorporated:	Delaware
Principal place of business:	122 S. Michigan Avenue Chicago, Illinois 60603

Texas Gas Transmission Corporation

State in which incorporated:	Delaware
Principal place of business:	3800 Frederica Street, Owensboro, Kentucky 42301

Trunkline Gas Company

State in which incorporated:	Delaware
Principal place of business:	3000 Bissonnet Avenue, Houston, Texas 77005

United Gas Pipe Line Company

State in which incorporated:	Delaware
Principal place of business:	700 Milam Street, Houston, Texas 77002

Consolidated Gas Supply Corporation

State in which incorporated:	West Virginia
Principal place of business:	445 W. Main Street, Clarksburg, West Virginia 26301

El Paso Natural Gas Company

State in which incorporated:	Delaware
Principal place of business:	Texas at Stanton, El Paso, Texas 79978

Northern Natural Gas Company

State in which incorporated:	Delaware
Principal place of business:	2223 Dodge Street, Omaha, Nebraska 68102

Mississippi River Transmission Corporation

State in which incorporated:	Delaware
Principal place of business:	9900 Clayton Road, St. Louis, Missouri 63124

Intervenor Panhandle Eastern Pipe Line Company is a corporation organized and existing under the laws of the State of Delaware having its principal places of business at 3000 Bissonnet Avenue, Houston, Texas 77005 and at 3444 Broadway, Kansas City, Missouri. It is not authorized to transact business in the State of Louisiana and in fact does not transact business in that State.

Intervenor Sea Robin Pipeline Company is an unincorporated joint venture between United Offshore Company and Southern Deepwater Pipeline Company. United Offshore Company is a Delaware corporation having its principal place of business in Houston, Texas; and Southern Deepwater Pipeline Company is a Delaware corporation having its principal place of business in Birmingham, Alabama.

12. The defendant is the sovereign State of Louisiana, with its capitol located in Baton Rouge, Louisiana.

DESCRIPTION OF FIRST USE TAX

13. Without in any way agreeing with the stated purposes, applicability, validity or constitutionality of the First Use Tax statute, all of which are denied, Intervenors state the following:

14. Despite assertions in the First Use Tax statute that the incidence of the tax "shall not be upon the natural gas nor upon the property or rights from which it is produced, but rather shall be only upon the privilege of performance or allowing the performance, by the owner, of the enumerated actions comprising first use within the

state," La. R.S. 47:1303E, the tax in reality and in economic effect is imposed upon the natural gas itself as it is transported in interstate commerce, or alternatively, upon the privilege of transporting the gas in interstate commerce.

15. The First Use Tax statute provides that the tax is "deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas," La. R.S. 47:1303C, and is made payable "by the owner or owners of the natural gas stream at the time any use ... first occurs within the state." La. R.S. 47:1305B. The term "owner" is defined as the person "having title to and the right to alienate the natural gas subject to the tax at any time a use occurs in the state." La. R.S. 47:1302(9). The statute expressly excludes "any person to whom temporary possession or control has been transferred" from the definition of "owner." La. R.S. 47:1302(9). Despite its denomination and description as a "First Use Tax," the tax is *not* imposed upon or made payable by a user of the gas *qua* user. Thus, the owner is liable for payment of the tax even though another entity may actually subject the gas to a "use" and derive the economic benefit of that "use." Furthermore, the statute expressly states that any contract providing that the owner shall have a "right to reimbursement or refund of such taxes from any other party in interest, other than a purchaser of such natural gas, is ... declared to be against public policy and unenforceable to that extent." La. R.S. 47:1303C.

16. The rate and measure of the tax is determined by the total volume of gas which is transported in interstate commerce, rather than by the volume of gas which is used or consumed within Louisiana. La. R.S. 47:1303B.

17. If the tax is not paid, the natural gas itself is deemed to be contraband and is subject to seizure and sale as such. La. R.S. 47:1306B.

18. The "use" upon which the tax is imposed is defined to include "the sale; the transportation in the state to the point of delivery at the inlet of any processing plant; the transportation in the state of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; transfer of possession or relinquishment of control at a delivery point in the state; processing for the extraction of liquefiable component products or waste materials; use in manufacturing; treatment; or other ascertainable action at a point within the state." La. R.S. 47:1302(8). Nevertheless, because of exclusions contained in the statute and credits contained in related statutes, the First Use Tax is tailored so as to affect only interstate businesses and so that its ultimate cost will be borne by consumers residing in states other than Louisiana who purchase such natural gas.

19. All amounts of gas which are used or consumed in the drilling for or production of oil, natural gas, sulfur, or in the processing of natural gas for liquids extraction within the state are exempt. La. R.S. 47:1303A. Gas shrinkage volume attributable to the extraction of ethane, propane, butanes, natural or casinghead gasoline or other liquefied hydrocarbons are exempt, provided shrinkage

volumes do not exceed equivalent gas volumes of the extracted liquids. La. R.S. 47:1303A. All amounts of natural gas which are used or consumed in the manufacture of fertilizer or anhydrous ammonia within the state are exempt. La. R.S. 47:1303A.

20. Furthermore, in conjunction with the Severance Tax Credit, La. R.S. 47:647, and the Tax Credit to Operators of Electric Generating Plants and Natural Gas Distribution Services, La. R.S. 47:11, the First Use Tax exempts Louisiana producers and consumers of affected natural gas, who are otherwise "owners" or "purchasers" and subject to the cost of the tax, from the burden of payment of the tax or of increased costs of gas as a result of the tax. (The text of La. R.S. 47:647 is contained in Appendix B, *infra,* pages A-3—A-5, and the text of La. R.S. 47:11 is contained in Appendix A, *infra,* pages A-1—A-2.) The First named act gives credits against severance tax liability to Louisiana producers in the exact dollar amount of payments by such producers as a result of the First Use Tax, while the second grants credits against other state taxes to all Louisiana consumers in the exact amount of increased costs attributable to the First Use Tax.

21. The purported purpose of the First Use Tax is "the exaction of fair and reasonable compensation to the citizens of this state for the costs incurred and paid with public funds, which costs inure solely to the benefit of the owners of natural gas produced beyond the boundaries of Louisiana, although introduced into the state, and to provide some measure of reimbursement to the citizens for damages to the state's waterbottoms, barrier reefs, and sensitive shorelands as a direct consequence of activity

within the state associated with such natural gas by the owners thereof." La. R.S. 47:1301C. The tax is allegedly imposed because "the imposition of a tax upon the severance of [oil and natural gas] from the soil and water of the state fail to prevent the economic waste of these Louisiana natural resources and will unfairly tax Louisiana producers in a discriminatory fashion, unless the state equally and uniformly taxes the introduction for the first time into the economy of the state natural gas which has not been otherwise or elsewhere subject to taxation by or within the United States." La. R.S. 47:1301A.

22. The First Use Tax statute provides that if any "use" as defined in the statute and "first occurring" is determined not to be a constitutionally taxable incident, "the tax shall be imposed upon the use first occurring thereafter." La. R.S. 47:1303F. Accordingly, if the first "use" to which the gas is subjected in any one stream is found to be unconstitutionally taxed and the next "use first occurring thereafter" to the gas as it flows through the pipeline is also found to be unconstitutionally taxed, Intervenors aver that any subsequent "use" occurring to the gas in that stream is beyond the reach of the statute and is not taxable.

23. Intervenors assert that all "uses" contemplated by La. R.S. 47:1302(8) occur at some point in the transportation of gas owned by Intervenors in interstate commerce into or through the State of Louisiana and that none of such "uses" outlined in the statute can be constitutionally taxed, all for the following reasons:

INVALIDITY OF THE FIRST USE TAX

24. The First Use Tax statute, sometimes in conjunction with other Louisiana statutes, unfairly discriminates against interstate commerce in violation of the Commerce Clause, article 1, § 8 of the United States Constitution, for the following reasons, among others:

(a) The First Use Tax statute discriminates against owners of natural gas on v hich no severance tax or tax on the volume of production has been paid, which is produced in or outside the boundaries of the State of Louisiana and which is moving in interstate commerce, by subjecting such gas to the First Use Tax, even though such gas undergoes the same uses within the State of Louisiana as does gas upon which a severance tax or tax on the volume of production has been paid, which is produced in or outside the state and which therefore is not subject to the First Use Tax.

(b) The First Use Tax statute exempts gas used or consumed in Louisiana for certain purposes or by certain taxpayers from liability for the tax, but denies these exemptions to other owners of gas or to gas transported through the State and used or consumed for similar purposes in other states, as described in paragraph 19 hereof.

(c) The First Use Tax statute, in conjunction with credit provisions contained in other Louisiana statutes referred to in paragraph 20 hereof,

confers discriminatory tax advantages to owners of oil and gas produced within the boundaries of the State of Louisiana who also own gas subject to the First Use Tax, and discriminates against owners of gas subject to the First Use Tax who do not also own oil or gas produced within the boundaries of Louisiana or who do not have sufficient production within Louisiana to receive the same tax advantages.

(d) The First Use Tax statute, in conjunction with other Louisiana statutes referred to in paragraph 20 hereof, provides consumers and distributors of gas situated in Louisiana with a credit in the amount of increased costs attributable to the First Use Tax, against liability for other state taxes in the exact amount of such increased cost, thereby discriminating against consumers and distributors similarly situated in other states. Therefore, Petitioners' out of state customers will ultimately bear the burden of the First Use Tax, whereas consumers and distributors similarly situated in Louisiana will not.

25. The First Use Tax statute unfairly burdens interstate commerce, is not fairly apportioned, tends to create multiple burdens on interstate commerce, is not based upon a sufficient nexus between Louisiana and the property or activity sought to be taxed to justify its imposition, and is not fairly related to any cost or burden imposed upon Louisiana by the interstate commerce subject to the tax or to the value of any services or benefits

provided by the State to such interstate commerce, in violation of the Commerce Clause, article 1, § 8 of the United States Constitution, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution for the following reasons, among others:

(a) The effect of the First Use Tax is to tax the gas itself as it moves in interstate commerce or, alternatively, to tax the privilege of transporting the gas in interstate commerce, rather than to tax the use of such gas, because the tax is imposed upon the owner of the gas rather than the person subjecting the gas to a "use" *qua* user, because the gas itself is subject to forfeiture for noncompliance with the statute, and because the tax is an unapportioned levy on the entire volume of gas transported in interstate commerce (with certain specified exemptions, La. R.S. 47:1303A).

(b) The First Use Tax statute creates the risk of correlative taxation by other states resulting in multiple tax burdens on natural gas destined for consumption at the end of its interstate journey beyond the State of Louisiana because the tax is imposed on "uses" which are an integral part of the transportation of the gas in interstate commerce, some or all of which recur in every state through which the gas is transported, and because the tax is an unapportioned levy on the entire volume of gas transported in interstate commerce (with the specified exemptions). The threat of such multiple burdens discriminates

against the owners of interstate gas upon which no severance tax or tax upon the volume of production has been paid and which is transported beyond the State of Louisiana and discriminates in favor of the owners of interstate and intrastate gas consumed within Louisiana.

(c) The amount of the First Use Tax is not fairly related to the alleged adverse impacts upon or benefits derived from the State of Louisiana as a result of the facilities or activities of each Intervenor within the State of Louisiana.

(d) Neither the incidence nor the amount of the First Use Tax is fairly related to the expressed purposes of the statute: that is, compensating the citizens of Louisiana for the alleged damages to the coastal areas of Louisiana and preventing the physical and economic waste of Louisiana's natural resources.

(e) Some Intervenors receive natural gas from onshore federal enclaves located within the boundaries of the State of Louisiana. Because no severance tax or tax upon the volume of production has been paid on such gas, it purportedly is subject to the First Use Tax, even though the imposition of the tax on this gas is not related to the expressed purposes of the statute.

(f) The rate of the First Use Tax is the same as the rate of the severance tax on gas produced within Louisiana, but the impact, if any, resulting from

any first "use" as defined in the statute within the State of Louisiana is wholly disproportionate to the impact resulting from severance.

(g) The impact of the First Use Tax is unrelated to (1) the activities of Intervenors in the State, (2) any possible adverse impact of such activities on the State, or (3) the benefits and services provided by the State, for all of which Intervenors pay other taxes, and/or for which the State of Louisiana has already been and will continue to be fully compensated pursuant to the Coastal Zone Management Act, 16 U.S.C. 1456(a).

(h) Neither the events giving rise to the application of the First Use Tax nor the natural gas subject to the tax have sufficient nexus with the State of Louisiana to justify imposition of the tax. The temporary presence, sale, exchange, transfer of possession or control, or transportation of the gas within Louisiana is not a sufficient nexus to justify imposition of a tax measured by the total volume of the gas moving through the State.

26. The First Use Tax statute directly violates the Impairment of Contract Clause of the United States Constitution, article I, § 10, clause 1, because La. R.S. 47:1303C declares invalid and unenforceable provisions in contracts which some Intervenors have with persons other than purchasers of gas subject to the tax which provide for reimbursement of the tax to those Intervenors. The First Use Tax statute should thus be declared null and void.

27. The First Use Tax statute deprives each Intervenor of the equal protection of the laws guaranteed under the Fourteenth Amendment of the Constitution of the United States because it falls unequally on similarly situated taxpayers and similar uses, for the following reasons, among others:

(a) Whereas the First Use Tax is directed entirely against natural gas pipelines, asserted damages to Louisiana's coastal areas, if any, result from many other types of activity by entities which receive the same services and benefits from the State of Louisiana as do the pipelines, none of which is burdened by the First Use Tax or any analogous tax.

(b) The First Use Tax statute discriminates in favor of owners of gas that is subjected to a first "use" in Louisiana as defined in the statute and on which a severance tax has been paid, and discriminates against owners of gas that is subjected to a first "use" in Louisiana as defined in the statute but on which a severance tax has *not* been paid. Nevertheless, whether a severance tax has or has not been paid bears no relation to the impact resulting from any first "use" within Louisiana.

28. The First Use Tax statute is in conflict with and repugnant to federal statutes and is accordingly void under the Supremacy Clause, article 6 of the United States Constitution, for the following reasons, among others:

(a) Section 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. 1333, provides that "state taxation laws shall not apply" to the Outer Continental Shelf. Notwithstanding the label given to it in the statute, the First Use Tax is, in economic effect, a severance tax on gas produced from the Outer Continental Shelf.

(b) The First Use Tax statute is in effect an attempt to regulate the transportation and/or sale of natural gas that is dedicated to interstate commerce by contracts and/or FERC certificates of public convenience and necessity pursuant to the Natural Gas Act, 15 U.S.C. 717 *et seq.* The sale and/or transportation of natural gas in interstate commerce is a matter within the exclusive jurisdiction of the Department of Energy and the Federal Energy Regulatory Commission and is beyond the reach of the State of Louisiana or any other state.

(c) The First Use Tax statute conflicts with and is repugnant to federal statutes, including the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, the Natural Gas Act, 15 U.S.C. 717 *et seq.*, and the Natural Gas Policy Act of 1978, Pub. L. No. 95-521 (1978), which constitute a comprehensive, exclusive and preemptive federal regulatory scheme duly adopted by Congress for the regulation, *inter alia*, of the sale and transportation of natural gas in interstate commerce.

29. To the extent that the First Use Tax statute imposes a tax on gas produced from federal enclaves within the State of Louisiana, the Statute violates article 1, § 8, clause 17 of the United States Constitution.

30. In the event the First Use Tax statute imposes a tax on gas imported into Louisiana from a foreign country on which the United States does not now levy any import tax or tariff (19 U.S.C. 1202, Schedule 4, Item 475.15), the statute violates the Import-Export Clause of the United States Constitution, article 1, § 10, clause 2, and the Commerce Clause, article 1, § 8 of the United States Constitution.

31. The First Use Tax statute is ambiguous and vague and violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that it does not describe the activities upon which the tax is imposed with sufficient certainty. For example, the statute defines "use" as, among other things, "other ascertainable action at a point within the state." La. R.S. 1302(8).

WHEREFORE, Intervenors respectfully pray that, after due proceedings, this Court declare and adjudge, pursuant to 28 U.S.C. 2201, that the Louisiana First Use Tax is unconstitutional and void as being contrary to the Constitution and Laws of the United States.

Each Intervenor further prays that Defendant be taxed for costs; and that the Court grant to each Intervenor such other and further relief as is just and appropriate in the circumstances of this case.

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Company, a Division of Tenneco
Inc., Texas Eastern Transmission Corporation
and Trunkline Gas Company

CERTIFICATE OF SERVICE

I, Daniel F. Collins, a member of the Bar of this Court, do hereby certify that three (3) copies of each of the foregoing motion and complaint were served upon each other party separately represented in this proceeding by depositing said copies in the United States mail, properly addressed, with airmail postage prepaid, pursuant to Rule 33 of the Rules of this Court, this 24th day of August, 1979.

_____

Daniel F. Collins

ENTRY OF APPEARANCES

I, Gene W. Lafitte, hereby certify that I am a member of the Bar of this Court, and that I represent Florida Gas Transmission Company and Southern Natural Gas Company, which are seeking leave to intervene in the action entitled "State of Maryland, State of Illinois, State of Indiana, Commonwealth of Massachusetts, State of Michigan, State of New York, State of Rhode Island and Providence Plantations, and State of Wisconsin v. State of Louisiana," No. 83, Original on the docket of this Court. It is respectfully requested that the Clerk of the Court for the United States Supreme Court enter my name as Counsel of Record for Florida Gas Transmission Company and Southern Natural Gas Company in the above entitled action.

/s/ Gene W. Lafitte

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I, C. McVea Oliver, hereby certify that I am a member of the Bar of this Court, and that I represent Transcontinental Gas Pipe Line Corporation, which is seeking leave to intervene in the action entitled "State of Maryland, State of Illinois, State of Indiana, Commonwealth of Massachusetts, State of Michigan, State of New York, State of Rhode Island and Providence Plantations, and State of Wisconsin v. State of Louisiana," No. 83, Original on the docket of this Court. It is respectfully requested that the Clerk of Court for the United States Supreme Court enter my name as Counsel of Record for Transcontinental Gas Pipe Line Corporation in the above entitled action.

/s/ C. McVea Oliver

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I, Ernest L. Edwards, hereby certify that I am a member of the Bar of this Court, and that I represent United Gas Pipe Line Company and Sea Robin Pipeline Company, which are seeking leave to intervene in the action entitled "State of Maryland, State of Illinois, State of Indiana, Commonwealth of Massachusetts, State of Michigan, State of New York, State of Rhode Island and Providence Plantations, and State of Wisconsin v. State of Louisiana," No. 83, Original on the docket of this Court. It is respectfully requested that the Clerk of the Court for the United States Supreme Court enter my name as Counsel of Record for United Gas Pipe Line Company and Sea Robin Pipeline Company in the above entitled action.

/s/ Ernest L. Edwards

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I, Arthur J. Waechter, Jr., hereby certify that I am a member of the Bar of this Court, and that I represent Texas Gas Transmission Corporation, which is seeking leave to intervene in the action entitled "State of Maryland, State of Illinois, State of Indiana, Commonwealth of Massachusetts, State of Michigan, State of New York, State of Rhode Island and Providence Plantations, and State of Wisconsin v. State of Louisiana," No. 83, Original on the docket of this Court. It is respectfully requested that the Clerk of the Court for the United States Supreme Court enter my name as Counsel of Record for Texas Gas Transmission Corporation in the above entitled action.

/s/ Arthur J. Waechter, Jr.

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I, Herschel L. Abbott, Jr., hereby certify that I am a member of the Bar of this Court, and that I represent Texas Gas Transmission Corporation, which is seeking leave to intervene in the action entitled "State of Maryland, State of Illinois, State of Indiana, Commonwealth of Massachusetts, State of Michigan, State of New York, State of Rhode Island and Providence Plantations, and State of Wisconsin v. State of Louisiana," No. 83, Original on the docket of this Court. It is respectfully requested that the Clerk of the Court for the United States Supreme Court enter my name as Counsel of Record for

Texas Gas Transmission Corporation in the above entitled action.

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I, Burt W. Sperry, hereby certify that I am a member of the Bar of this Court, and that I represent Michigan Wisconsin Pipe Line Company and Mississippi River Transmission Corporation, which are seeking leave to intervene in the action entitled "State of Maryland, State of Illinois, State of Indiana, Commonwealth of Massachusetts, State of Michigan, State of New York, State of Rhode Island and Providence Plantations, and State of Wisconsin v. State of Louisiana," No. 83, Original on the docket of this Court. It is respectfully requested that the Clerk of the Court for the United States Supreme Court enter my name as Counsel of Record for Michigan Wisconsin Pipe Line Company and Mississippi River Transmission Corporation in the above entitled action.

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I, Daniel F. Collins, hereby certify that I am a member of the Bar of this Court, and that I represent Michigan Wisconsin Pipe Line Company, which is seeking leave to intervene in the action entitled "State of Maryland, State of Illinois, State of Indiana, Commonwealth of Massachusetts, State of Michigan, State of New York, State of Rhode Island and Providence Plantations, and State of Wisconsin v. State of Louisiana," No. 83, Original on the docket of this Court. It is respectfully requested that the Clerk of the Court for the United States Supreme Court enter my name as Counsel of Record for Michigan Wisconsin Pipe Line Company in the above entitled action.

/s/ Daniel F. Collins

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I, Frank J. Peragine, hereby certify that I am a member of the Bar of this Court, and that I represent Columbia Gas Transmission Corporation, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Natural Gas Pipeline Company of America, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Tennessee Gas Pipeline Company, a Division of Tenneco Inc., Texas Eastern Transmission Corporation and Trunkline Gas Company which are seeking leave to intervene in the action entitled "State of Maryland, State of Illinois, State of Indiana, Commonwealth of Mas-

sachusetts, State of Michigan, State of New York, State of Rhode Island and Providence Plantations, and State of Wisconsin v. State of Louisiana," No. 83, Original on the docket of this Court. It is respectfully requested that the Clerk of the Court for the United States Supreme Court enter my name as Counsel of Record for Columbia Gas Transmission Corporation, Tennessee Gas Pipeline Company, a Division of Tenneco Inc., Texas Eastern Transmission Corporation, Trunkline Gas Company, Natural Gas Pipeline Company of America, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Northern Natural Gas Company and Panhandle Eastern Pipe Line Company, in the above entitled action.

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APPENDICES

APPENDIX A

La. R.S. 47:11. Tax Credit for Electric and Natural Gas Service

A. Recognizing that the state of Louisiana must depend upon natural gas produced in the federal domain of the outer continental shelf as a supplement to its declining domestic supply, and recognizing that this natural gas is regulated exclusively by agencies of the federal government and is therefore outside of the regulatory jurisdiction of the state of Louisiana, and that the necessarily higher transportation and marketing costs for such natural gas results in higher fuel costs for utilities and industries within the state dependent thereon, the following tax credits, being deemed fair and in the best interest of the state, are hereby authorized.

B. Every electric generating plant and natural gas distribution service municipally owned or regulated, or regulated by the Louisiana Public Service Commission and every direct purchase of natural gas from the owner of the natural gas, other than an owner of natural gas regulated by a municipality or the state, for consumption only by such purchaser, shall be allowed a direct tax credit against any tax or combination of taxes, other than severance taxes, owed to the state, upon showing that fuel costs for electricity generation or natural gas distribution or consumption have increased as a direct result of increases in transportation and marketing costs of natural gas delivered from the federal domain of the outer continental shelf and upon which such entities are dependent for a portion of their supply. Increased transportation and marketing costs shall not include increases in wellhead prices or increases attributable to inflation factors. In the event that the increase in fuel costs exceeds the tax or combination of taxes owed to the state, every such electric generating plant, natural gas distribution service or other affected purchaser shall be issued

tax warrants in amounts not to exceed in the aggregate the difference between the increase in the fuel costs and the tax or taxes owed to the state, which tax warrants may be used in the payment of any tax or combination of taxes owed to any parish, municipality, political subdivision or other taxing authority of the state. Tax credits and warrants shall be issued annually hereunder and shall not exceed two million dollars in the aggregate. No electric generating plant, natural gas distribution service, or other affected purchaser shall be issued tax credits or warrants totaling less than two hundred fifty dollars annually, except that increased costs totaling less than the minimum credit established herein may be carried forward and accumulated for three years from the year in which the increased costs occur in order that the applicant may utilize the tax credit authorized herein prior to the end of the prescriptive period otherwise set forth in this Title. In the event that total increased fuel costs exceed two million dollars in the aggregate, the Secretary of the Department of Revenue and Taxation shall issue tax credits and warrants based on a formula to be fixed by regulation which shall insure each qualifying applicant a proportionate share of the maximum tax credits established herein.

C. The secretary of the Department of Revenue and Taxation shall promulgate rules providing for the determination of the amount of any tax credit or tax warrant provided for herein and for administration of the provisions of this Section.

D. The state shall have a right of recovery of tax credits granted pursuant to this Section in the event that increased transportation and marketing costs for which credits are granted hereunder are reimbursed or refunded for any reason to any entity receiving the credit.

APPENDIX B

La. R.S. 47:647. Severance Tax Credit

A. Every taxpayer liable for and remitting taxes levied and collected pursuant to R.S. 47:1301 through 1307 and each taxpayer who bears such taxes as a direct result of contractual terms or agreements applied in disregard of R.S. 47:1303C, shall be allowed a direct tax credit, at any time following payment of such tax, not in excess of the amount which must be borne by such taxpayer, against severance taxes owed by such taxpayer to the state, the amount of which credit shall not exceed the amount of severance taxes for which such taxpayer is liable to the state as a direct consequence of the privilege of severing natural resources from the surface of the soil or water of the state. A taxpayer who bears any portion of the tax levied pursuant to R.S. 47:1301 through 1307 as a direct result of contractual terms or agreements applied in disregard of R.S. 47:1303C, shall be entitled to a credit under this Section only after there has been a determination by the Louisiana Supreme Court or the appropriate United States District Court that such taxpayer must bear the tax, provided that if the taxpayer or the state has sought and been denied a preliminary injunction enjoining the application of such contractual terms or agreements sought to be rendered inapplicable by R.S. 47:1303(C), then such taxpayer shall be entitled to a credit under this Section from the date of denial of the preliminary injunction.

B. No tax credit pursuant to this Section shall be allowed for any taxes remitted pursuant to R.S. 47:1301 through 1307 for which a taxpayer has an enforceable right to reimbursement from a third party. A taxpayer claiming any credit under this Section shall furnish to the secretary of the Department of Revenue and Taxation all applicable contracts and other information requested by

the secretary, which relate to such taxpayer's possible right to reimbursement. If the secretary determines that the taxpayer has an enforceable right to reimbursement, which the taxpayer is not actually receiving, the secretary shall so rule. Within thirty days of receipt of notice of such ruling the taxpayer shall have the right to appeal such ruling to the Louisiana Board of Tax Appeals which board shall determine in open meeting whether there is sufficient evidence to support the ruling of the secretary. If the board determines that there is not sufficient evidence it shall overrule the secretary and the taxpayer shall not be required to take any other action in order to receive the tax credit provided by this Section. If the board determines that there is sufficient evidence, the taxpayer shall thereafter have a period of ninety days within which to institute any administrative or judicial proceedings necessary to assert such right to reimbursement. The taxpayer shall pursue such administrative or judicial proceedings with due diligence. At all times prior to commencement of such administrative or judicial proceedings and during the pendency thereof, and during any appeals therefrom, the taxpayer shall continue to be entitled to the credit provided in this Section; provided that if no action is taken by the taxpayer to assert the right to reimbursement within ninety days no further credit shall be granted and the state shall have the right to recover from the taxpayer any credits granted prior to the expiration of such time. If it is determined in any administrative proceedings that a taxpayer has no right to such reimbursement, then the taxpayer shall not be entitled to continue receiving the credit allowed by this Section, unless the taxpayer within the time allowed by applicable law seeks judicial review of such administrative determination and pursues such judicial review to a final

and unappealable judgment. If the administrative or judicial determination establishes that the taxpayer has an enforceable right to reimbursement of the taxes levied pursuant to R.S. 47:1301 through 1307, and if the taxpayer is so reimbursed, then such taxpayer shall be liable to the state for additional severance taxes equivalent to the amount of taxes levied under R.S. 47:1301 through 1307 for which such taxpayer has received reimbursement. The taxpayer shall also pay to the state interest on such taxes at the rate prescribed in R.S. 47:1601, accruing from the date on which the credit attributable to such taxes was taken to the date of final payment but only to the extent of any interest which the taxpayer has itself received on the amount of reimbursement.

C. The credit allowed by this Section shall not affect the percentage allocation of severance tax proceeds otherwise due to any parish, and the secretary of the Department of Revenue and Taxation, with the concurrence of the state treasurer shall, by regulation, establish such procedures as may be deemed necessary to provide therefor.

D. The secretary of the Department of Revenue and Taxation shall promulgate rules and regulations necessary for the implementation and administration of the tax credit provided for herein.

APPENDIX C

La. R.S. 47:1301-07. First
Use Tax on Natural Gas

§ 1301. State policy

A. The conservation of natural resources is of vital concern to the present and future welfare of our state and nation, and it is the policy of the state of Louisiana, in the exercise of its police and taxing power, to prevent the physical and economic waste of its natural resources. It is recognized that other existing laws providing limitations upon the production of oil and gas are allowed within the state, and the imposition of a tax upon the severance of these natural resources from the soil and water of the state fail to prevent the economic waste of these Louisiana natural resources and will unfairly tax Louisiana producers in a discriminatory fashion, unless the state equally and uniformly taxes the introduction for the first time into the economy of the state natural gas which has not been otherwise or elsewhere subject to taxation by or within the United States.

B. The waterbottoms, barrier islands and coastal areas within the state are also valuable natural resources, as they provide essential habitat for many forms of wildlife and aquatic life in Louisiana, help protect our coastline from erosion, and are of aesthetic, commercial and recreational value to the citizens of our state and nation. It is further recognized that while other existing laws, applicable to the production of oil and natural gas, provide recompense in the form of taxes to the people of the state of Louisiana for adverse effects on the natural resources, barrier islands, waterbottoms, and shorelands of this state, these laws fail to provide protection for such valuable natural resources or compensation to the people of Louisiana for the necessary adverse effects caused by

entry for use for the first time in Louisiana, under the protection of the state's laws, of natural gas which has not been subject to taxation otherwise or elsewhere by or within the United States unless the state levies an equitable tax thereon.

C. It is one of the express purposes of this tax to require the exaction of fair and reasonable compensation to the citizens of this state for the costs incurred and paid with public funds, which costs enure solely to the benefit of the owners of natural gas produced beyond the boundaries of Louisiana, although introduced into the state, and to provide some measure of reimbursement to the citizens for damages to the state's waterbottoms, barrier reefs, and sensitive shorelands as a direct consequence of activity within the state associated with such natural gas by the owners thereof.

§ 1302. Definitions

The definitions hereinafter set forth shall have the meanings ascribed to them unless the context of use clearly indicates otherwise:

(1) "Oil, condensate, distillate or similar hydrocarbons" are liquid hydrocarbons remaining in a liquid state at 15.025 pounds per square inch absolute and sixty degrees Fahrenheit.

(2) "Natural gas" is natural or casinghead gaseous phase hydrocarbons remaining after separation from either oil, condensate, or distillate and measured at a pressure base of 15.025 pounds per square inch absolute at a temperature base of sixty degrees Fahrenheit.

(3) "Processing" is the scrubbing of a natural gas stream by specifically applied mechanical processes of

absorption, adsorption, compression, cooling, cryogenics, refrigeration or any combination thereof for the purpose of extracting natural or casinghead gasoline, methane, ethane, propane, butane and other liquefiable hydrocarbons.

(4) "Refining" is the process by which crude oil, distillate and condensate are separated or fractionated into the various component parts or purified.

(5) "Storage" means and includes any keeping or retention in this state of oil and natural gas.

(6) "Measurement" is any process by which the volume of natural gas affected by this Part is determined.

(7) "Sale" is the transfer of ownership of and title to natural gas from one person to another for valuable consideration.

(8) "Use" is: the sale; the transportation in the state to the point of delivery at the inlet of any processing plant; the transportation in the state of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; transfer of possession or relinquishment of control at a delivery point in the state; processing for the extraction of liquefiable component products or waste materials; use in manufacturing; treatment; or other ascertainable action at a point within the state.

(9) "Owner" is the person or person having title to and the right to alienate the natural gas subject to the tax at the time a use occurs in the state. It shall not include any person to whom temporary possession or control has been transferred. In the event of a sale the purchaser shall be deemed the owner.

§ 1303. Imposition; exclusion; commingling

A. Pursuant to the exercise of the police and taxing powers of the state for the purpose of preventing economic and physical waste of our natural resources and for protecting and providing compensation for adverse effects upon the state's shorelands, waterbottoms and barrier islands, there is hereby levied and imposed a tax upon the first occurrence within this state of any use, as defined in this Part, of any natural gas upon which no severance tax or tax upon the volume of production has been paid, or is legally due to be paid, to this state or any other state or territory of the United States, or which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country. The tax levied herein shall not apply to natural gas otherwise subject thereto when such gas is used or consumed in the drilling for or production of oil, natural gas, sulphur, or in the processing of natural gas for liquids extraction within the state; nor shall it apply to gas shrinkage volumes attributable to the extraction of ethane, propane, butanes, natural or casinghead gasoline or other liquefied hydrocarbons, provided shrinkage volumes shall not exceed equivalent gas volumes of the extracted liquids computed by recognized conversion factors used by the Gas Processors Association nor shall it apply to natural gas used or consumed in the manufacture of fertilizer and anhydrous ammonia within the state.

B. The tax imposed by Subsection A of this Section shall be computed at a rate of seven cents on each unit of natural gas as to which a use first occurs within the state. For the purposes of this tax a unit shall be one thousand cubic feet of natural gas as measured at a pressure base of 15.025 pounds per square inch absolute and at a temperature base of sixty degrees Fahrenheit.

C. In furtherance of the public policy and purpose set forth in Section 1301 of this part, and particularly Subsection C of said Section, this tax shall be deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas. Any agreement or contract by which an owner of natural gas at the time a taxable use first occurs claims a right to reimbursement or refund of such taxes from any other party in interest, other than a purchaser of such natural gas, is hereby declared to be against public policy and unenforceable to that extent. Notwithstanding any such agreement or contract, such an owner shall not have an enforceable right to any reimbursement or refund on the basis that this tax constitutes a cost incurred by such owner by virtue of the separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, or that this tax constitutes any other grounds for reimbursement or refund under such agreement or contract, unless there has been a final and unappealable judicial determination that such owner is entitled to such reimbursement or refund, notwithstanding the public policy and purpose of this part and the foregoing provisions of this Subsection C. In any legal action pursuant to this Subsection, the state shall be an indispensable party in interest.

D. When natural gas subject to the tax levied in this Part is commingled with oil and/or natural gas not subject to the tax levied herein, it shall be presumed that the volumes withdrawn from the commingled mass by the first use shall be in the same ratio as the ratio of the resources entering the commingled mass.

E. Nothing in this Part shall be construed as imposing any tax on the production, severance, or ownership of natural gas produced outside of the

boundaries of the state of Louisiana, it being the intention of this Part that the incidence of this tax shall not be upon the natural gas nor upon the property or rights from which it is produced, but rather shall be only upon the privilege of performance or allowing the performance, by the owner, of the enumerated actions comprising first use within the state.

F. If any use as defined in this Part and first occurring is determined not to be a constitutionally taxable incident, the tax shall be imposed upon the use first occurring thereafter.

§ 1304. Authority of the collector of revenue to promulgate rules and regulations

The collector of revenue is authorized to promulgate rules and regulations necessary to effect the intent and purpose of this Part, including regulations concerning the measurement of products associated with the incidents taxed herein.

§ 1305. Reports and payments; reimbursement limitations

A. The owner or owners of the natural gas at the time a use first occurs in this state shall file with the Department of Revenue and Taxation on or before the last day of each month following the month of first use, statements on forms procured from the department, showing the volumes, values, owners and such other information as the department may require by law or regulation for computing and assessing the amount of tax due under this Part.

B. The taxes levied by this Part shall be due and payable to the Department of Revenue and Taxation monthly on or before the last day of the month following

the month to which the tax is applicable by the owner or owners of the natural gas stream at the time any use, as defined herein, first occurs within the state.

§ 1306. Delinquent tax; failure to report or pay

A. The tax provided by this Part shall become delinquent after the date fixed for each monthly report to be filed in the office of the collector, and from such time shall be subject to the addition of interest, penalties, and costs as provided in Chapter 18, Subtitle II of this Title.

B. The failure to report or pay, within ninety days, in the manner and at the time required herein, the tax imposed by this Part on the first use of natural gas is unlawful, and the natural gas shall be deemed illegal gas subject to the provisions of R.S. 30:19 and, as such, shall be treated as contraband and shall be seized and sold as provided by R.S. 30:20.

§ 1307. Disposition of collections

The secretary shall remit all collections of taxes provided by this Part each month to the state treasurer, not later than the tenth day of the month following the month in which collections are made. The state treasurer shall credit all such collections to the state treasury.

APPENDIX D

La. R.S. 47:1576. Remittance of Tax Under Protests; Remedy At Law For Recovery And Interest On Amounts Recovered

A. A right of action is hereby created to afford a remedy at law for any person aggrieved by the prohibition of courts restraining the collection of tax, penalty, interest, or other charges imposed in this Subtitle. The person resisting the payment of any amount found due by the collector, or of enforcement of any provisions of this Subtitle, shall remit the amount found due to the collector and at that time shall give the collector notice of his intention to file suit for the recovery thereof. Upon receipt of this notice, the amount remitted shall be placed in an escrow account and held by the collector or his duly authorized representatives for a period of thirty days. If suit is filed within the thirty-day period for the recovery of such amount, the funds in the escrow account shall be further held pending the outcome of the suit. If the person prevails, the collector shall refund the amount to the claimant, with interest at the rate of six percent per annum covering the period from the date the funds were received by the collector to the date of refund.

B. This Section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter, for a full and complete adjudication of any and all questions arising in the enforcement of this Subtitle as to the legality of any tax accrued or accruing or the method of enforcement thereof. In such action, service of process upon the collector shall be sufficient service, and he shall be the sole necessary and proper party defendant in any such suit.

C. This Section shall be construed to provide a legal remedy in the state or federal courts, by action at law, in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress or the United States Constitution, or the Constitution of the state of Louisiana, or in any case where jurisdiction is vested in any of the courts of the United States.

D. Upon request of a person and proper showing by such person that the principal of law involved in an additional assessment is already pending before the courts for judicial determination, such person, upon agreement to abide by the decision of the courts, may remit the additional assessment under protest, but need not file an additional suit. In such cases the tax so paid under protest shall be placed in an escrow account and held by the collector until the question of law involved has been determined by the courts and shall then be disposed of as therein provided.

APPENDIX E

Federal Rules of Civil Procedure
Rule 24. Intervention

(a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) **Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) **Procedure.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same

procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND, STATE OF ILLINOIS, STATE OF INDIANA, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF NEW YORK, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, AND STATE OF WISCONSIN,

Plaintiffs,

vs.

STATE OF LOUISIANA,

Defendant.

MOTION ON BEHALF OF THE STATE OF NEW JERSEY FOR LEAVE TO INTERVENE AND FOR LEAVE TO FILE COMPLAINT, COMPLAINT AND BRIEF IN SUPPORT THEREOF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND, STATE OF ILLINOIS, STATE OF INDIANA, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF NEW YORK, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, AND STATE OF WISCONSIN,

Plaintiffs,

vs.

STATE OF LOUISIANA,

Defendant.

MOTION ON BEHALF OF THE STATE OF NEW JERSEY FOR LEAVE TO INTERVENE AND FOR LEAVE TO FILE COMPLAINT

Pursuant to Rule 9 and Rule 35 of the Rules of the Supreme Court, the State of New Jersey, by its attorneys, ask leave of this Court to intervene as a party plaintiff and to file the Complaint against the State of Louisiana submitted herewith.

Motion

As is more fully set forth in the accompanying Brief in Support of Motion for Leave to Intervene and File Complaint, the State of New Jersey respectfully submits:

1. The State of Louisiana has imposed a "First Use Tax" on natural gas from the Outer Continental Shelf and on natural gas from other countries and other states, in transit in interstate commerce to the State of New Jersey.

2. The State of New Jersey has, in recent years, imported almost all of its natural gas from the State of Louisiana. The bulk of that natural gas emanated from the Outer Continental Shelf and therefore would be subject to the "First Use Tax."

3. The economic impact of the "First Use Tax" on the State of New Jersey as a consumer would exceed 20 thousand dollars annually, and the economic impact on the general welfare of the State of New Jersey would exceed 17 million dollars annually.

4. The economic impact on the State and the position of the State of New Jersey with regard to the imposition of the "First Use Tax" is the same as the Plaintiff States whose complaint is presently before the Court.

5. The contentions in the Proposed Complaint attached to the Motion as to the unconstitutionality and invalidity of the Louisiana "First Use Tax" are identical to those made in the Complaint of Plaintiffs, presently before the Court.

Motion

6. The Louisiana "First Use Tax" violates the rights and protections guaranteed to the State of New Jersey and its citizens by article I, section 8, clause 3 ("the commerce clause") and other provisions of the United States Constitution.

Respectfully submitted,

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Plaintiffs,

vs.

STATE OF LOUISIANA,

Defendant.

Complaint

New Jersey by its attorneys, bring this civil action to obtain declaratory and injunctive relief against Louisiana, and complains and alleges as follows:

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JURISDICTION AND STANDING

I.

The exclusive original jurisdiction of this Court is invoked under the Constitution of the United States, article III, section 2, clauses 1 and 2 ("Controversies between two or more States"), and 28 U.S.C. § 1251(a)(1) (1976). Plaintiffs have no other plain, speedy or adequate remedy at law and have no remedy whatsoever in any other federal court.

II.

This action seeks a declaratory judgment, pursuant to 28 U.S.C. §§2201-2202 (1976), that the State of Louisiana's First Use Tax on Natural Gas, LA. REV. STAT. ANN. §§47:1301-1307 (West Supp. 1979) (hereinafter referred to as "First Use Tax," a copy of which is attached hereto as Exhibit A and incorporated herein by reference), violates the rights and protections afforded to plaintiffs by the United States Constitution under article I, section 8, clause 3 (commerce clause); article I, section 10, clause 1 (impairment of contracts clause) and clause 2 (import-export clause); and article VI, clause 2 (supremacy clause), and denies to plaintiffs the equal protection of the laws guaranteed by the fourteenth amendment. This suit also seeks to enjoin permanently the enforcement of the First Use Tax and to compel Louisiana to refund all revenues collected during the pendency of this action with all interest earned on such revenues.

III.

The plaintiff is the sovereign State of New Jersey with its capitol located at Trenton, New Jersey. Plaintiff brings this action in its proprietary capacity as a substantial direct purchaser of natural gas upon which the First Use Tax will be imposed, and in that capacity will sustain substantial monetary damages as a result of the First Use Tax. Plaintiff also brings this action in its *parens patriae,* or quasi-sovereign capacity, as guardian of the health, welfare and prosperity of the citizens of New Jersey.

IV.

The defendant is the sovereign State of Louisiana, with its capitol located at Baton Rouge, Louisiana.

LOUISIANA FIRST USE TAX

V.

The First Use Tax will be imposed, at a rate of seven cents per thousand cubic feet ("Mcf") (§47:1303B) "upon the first occurrence within [Louisiana] of any use . . . of any natural gas upon which no severance tax or tax upon the volume of production has been paid, or is legally due to be paid, to this state or any other state or territory of the United States, or which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country." §47:1303A. The tax, however, "shall not apply to natural gas otherwise subject thereto when such gas is used or consumed in

the drilling for or production of oil, natural gas, sulphur, or in the processing of natural gas for liquids extraction within the state; nor shall it apply to gas shrinkage volumes attributable to the extraction of ethane, propane, butanes, natural or casinghead gasoline or other liquefied hydrocarbons . . . [;] nor shall it apply to natural gas used or consumed in the manufacture of fertilizer and anhydrous ammonia within the state." *Id.*

VI.

Use is defined as "[1] the sale; [2] the transportation in [Louisiana] to the point of delivery at the inlet of any processing plant; [3] the transportation in [Louisiana] of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; [4] transfer of possession or relinquishment of control at a delivery point in [Louisiana]; [5] processing for the extraction of liquefiable component products or waste materials; [6] use in manufacturing; [7] treatment; or [8] other ascertainable action at a point within [Louisiana]." §47:1302(8).

VII.

The First Use Tax is characterized by Louisiana as "a cost associated with uses made by the owner in preparation of marketing of the natural gas." §47:1303C. The term "owner" is defined as "the person or person [*sic*] having title to and the right to alienate the natural gas subject to the tax at the time a use occurs in [Louisiana]." §47:1302(9). Any contract providing that the owner shall have "a right to reimbursement or refund

of such taxes from any other party in interest, other than a purchaser of such natural gas, is . . . declared to be against public policy and unenforceable to that extent." §47:1303C. The statute recites that the First Use Tax shall not be imposed upon "the production, severance, or ownership of natural gas produced outside of the boundaries of the state of Louisiana . . . [and] that the incidence of this tax shall not be upon the natural gas nor upon the property or rights from which it is produced, but rather shall be only upon the privilege of performance or allowing the performance, by the owner, of the enumerated actions comprising first use within [Louisiana]." §47:1303E.

VIII.

The purpose of the First Use Tax is stated to be "the exaction of fair and reasonable compensation to the citizens of [Louisiana] for the costs incurred and paid with public funds, which costs enure solely to the benefit of the owners of natural gas produced beyond the boundaries of Louisiana, although introduced into [Louisiana], and to provide some measure of reimbursement to the citizens for damages to [Louisiana's] waterbottoms, barrier reefs, and sensitive shorelines as a direct consequence of activity within the state associated with such natural gas by the owners thereof." §47:1301C. Louisiana asserts that the tax is imposed because "the imposition of a tax upon the severance of [oil and natural gas] from the soil and water of [Louisiana] fail[s] to prevent the economic waste of these Louisiana natural resources and will unfairly tax [Louisiana] producers in a discriminatory fashion, unless [Louisiana] equally

and uniformly taxes the introduction for the first time into the economy of [Louisiana] natural gas which has not been otherwise or elsewhere subject to taxation by or within the United States." §47:1301A.

IX.

The First Use Tax is due and payable "monthly on or before the last day of the month following the month to which the tax is applicable." §47:1305B. If the tax is not paid in a timely manner the owner is "subject to the addition of interest, penalties, and costs." §47:1306A. If the tax is not paid "within ninety days, . . . the natural gas shall be deemed illegal gas . . . and, as such, shall be treated as contraband and shall be seized and sold." §47:1306B.

NATIONAL IMPACT OF THE FIRST USE TAX

X.

The First Use Tax will be required to be paid by interstate natural gas pipeline companies who transport through Louisana natural gas produced outside the boundaries of that State. Each of these pipeline companies is a "natural gas company" as defined in Section 2 of the Natural Gas Act, 52 Stat. 821, 15 U.S.C. § 717a(6) (1976), and is regulated by the Federal Energy Regulatory Commission ("FERC") as successor to the Federal Power Commission.

XI.

The interstate pipelines upon whom the tax will be imposed purchase substantial quantities of natural gas produced from the Outer Continental Shelf ("OCS"), a federal domain defined and delineated in the Outer Continental Shelf Lands Act, 67 Stat. 462-70, 43 U.S.C. §§ 1331-1343 (1976), outside the seaward boundaries of the State of Louisiana. Each interstate pipeline purchases said gas from producers pursuant to certificates of public convenience and necessity issued by FERC, and transports or has such gas transported through pipelines, into and through the State of Louisiana, for sale to, *inter alia,* gas distributing companies and muincipalities for resale, under certificates of public convenience and necessity issued by FERC, and under rate schedules or tariffs on file with and approved by FERC.

XII.

It is estimated by FERC that the First Use Tax will be imposed on approximately 3,190 million Mcf of natural gas entering Louisiana in interstate commerce from the OCS annually. This volume is based on total OCS production entering Louisiana in 1977 of 3,647,513,674 Mcf, less 220 million Mcf in shrinkage during processing; less 100 million Mcf owned by the producer of the gas reserved for the producer's own use or direct industrial sales and not subject to FERC's rate jurisdiction; less 140 million Mcf consumed in the production of fertilizer and anhydrous ammonia in Louisiana. In addition, the First Use Tax will be imposed on all volumes of natural gas imported into the United States from

foreign countries which are transported through Louisiana in the foreign and interstate commerce of the United States.

XIII.

In Docket No. RM78-23 (*State of Louisiana First Use Tax in Pipeline Rate Cases*), Order No. 10 ("Order Establishing Procedures Governing Pipeline Recovery of the State of Louisiana First Use Tax," issued August 28, 1978, 43 Fed. Reg. 45,553 (Oct. 3, 1978)); Order No. 10-A ("Order on Rehearing, Modifying Prior Order, Amending Regulation and Requesting Comments" issued December 20, 1978, 43 Fed. Reg. 60,438 (Dec. 28, 1978)), *appeal docketed, Tennessee Gas Pipe Line Co.* v. *Federal Energy Regulatory Commission,* No. 78-3813, *et al.* (5th Cir. Dec. 26, 1978)), and Order No. 10-B ("Order on Rehearing, Modifying Prior Order and Amending Regulations," issued March 2, 1979, 44 Fed. Reg. 13,460 (Mar. 12, 1979)), FERC has adopted procedures which, under the conditions specified in those orders, permit the pipelines required to pay the First Use Tax to collect the amount of such tax from their customers pursuant to an automatic tracking mechanism. Those charges remain subject to refund with interest, pending a final judicial determination of the constitutionality of the First Use Tax.

XIV.

Based on the OCS volumes entering Louisiana in interstate commerce in 1977, the imposition of the First Use Tax will cost interstate consumers approximately 225 million dollars per annum.

IMPACT OF THE FIRST USE TAX UPON THE PLAINTIFF STATE AND ITS CITIZENS

XV.

On April 1, 1979, the effective date of the First Use Tax, the plaintiff state and its citizens were impacted by the First Use Tax, with resulting economic burdens and hardship. The natural gas supplies of the plaintiff state and of the citizens of the plaintiff state are delivered by interstate natural gas pipeline companies who are subject to the tax and who will collect such tax from plaintiff state and its citizens.

XVI.

New Jersey's current annual usage of gas is approximately 295 billion cubic feet. Based on a current estimate that 203 billion cubic feet of that natural gas is subject to the First Use Tax, the tax will cost the State of New Jersey approximately 20 thousand dollars annually. The State of New Jersey also purchases quantities of natural gas through local instrumentalities.

XVII.

The total economic cost of the First Use Tax on the State of New Jersey, its instrumentalities and its citizens will be approximately 17 million dollars a year.

XVIII.

Over 1,800,000 New Jersey consumers who use natural gas will be directly economically affected by the imposi-

tion of the First Use Tax. In addition, New Jersey consumers are increasingly converting their fuel consumption mechanisms from oil to gas.

First Cause of Action

XIX.

Plaintiffs reallege, as though set forth in full, the allegations contained in Paragraphs I through XVIII.

XX.

The First Use Tax constitutes an unreasonable, unlawful, and prohibited burden on interstate commerce, in contravention of article 1, section 8, clause 3 of the United States Constitution (commerce clause) which provides, in pervides, in pertinent part, that:

> The Congress shall have Power . . . [to] regulate . . . Commerce . . . among the several States. . . .

The First Use Tax violates the commerce clause in that it burdens natural gas moving in interstate commerce, it is not applied to activities with a substantial nexus with Louisiana, it is not fairly apportioned, it discrimnates against interstate and foreign commerce, and it is not fairly related to the asserted cost burdens imposed upon Louisiana by the interstate commerce subject to the tax, or to the value of the services and benefits provided by the State.

A. The First Use Tax Burdens Natural Gas Moving In Interstate Commerce.

XXI.

Entry of natural gas into Louisiana from the OCS or from a sister state or foreign country constitutes movement in interstate commerce, as does the subsequent transportation of this gas out of Louisiana to consumers in other states. This continuous movement is not interrupted by the alleged "uses" defined in Paragraph VI, *supra,* because the activities described therein are integral to the movement of such gas from the point of production to the point of ultimate consumption in Louisiana or other states. Insofar as the First Use Tax is deemed to apply to natural gas produced from the OCS, or imported from a foreign country, which is transported into and through Louisiana, it is a tax on natural gas moving in interstate commerce. Thus, the effect of the First Use Tax is to tax directly the privilege of transporting natural gas in interstate commerce and not to tax the use of such gas.

B. The Uses Taxed By The First Use Tax Do Not Have A Sufficient Nexus With Louisiana To Justify Imposition Of The Tax.

XXII.

The uses described in § 47:1302(8) do not have a sufficient nexus with Louisiana to justify the imposition of the First Use Tax, computed on the basis of the total volume of natural gas produced from the OCS or im-

ported into the United States, which is transported through Louisiana pursuant to certificates of public convenience and necessity issued by FERC. In particular, the transportation of natural gas through Louisiana does not establish a sufficient nexus to justify a tax on the total volume of OCS and imported gas moving through the State. Moreover, the imposition of the First Use Tax on such gas on the basis of "other ascertainable action at a point within [Louisiana]" (§ 47:1302(8)) fails to establish a sufficient nexus with Louisiana. The phrase is unreasonably vague, and fails to establish the nexus required to justify the tax.

C. The First Use Tax Is Not Fairly Apportioned.

XXIII.

The First Use Tax is not fairly apportioned. The tax is applied to the total volume of imported gas, and gas from the OCS, transported into Louisiana, without limitation to the volumes of such gas consumed in Louisiana. The tax is not related to investment in facilities, actual business activities, payroll, or other indicia of a concrete nexus with Louisiana. The tax is a tax on the gas, not on local activities.

XXIV.

In addition, this lack of apportionment exposes OCS and imported gas to multiple tax burdens because, if Louisiana is permitted to impose such a tax, every state through which such gas passes may also do so. There are measurement and storage facilities in many of the

states through which natural gas passes between Louisiana and the plaintiff states, and gas is frequently processed, exchanged, or subjected to analogous "uses" in such states.

D. The First Use Tax Unduly Discriminates Against Interstate Commerce.

XXV.

The First Use Tax, sometimes in conjunction with other Louisiana statutes, unfairly, unreasonably, and unduly discriminates against interstate commerce, as is described in paragraphs XVI to XXVIII.

XXVI.

The First Use Tax discriminates against interstate commerce because it is imposed only on gas produced from the OCS and from other states and gas imported into the United States. Such gas is moving in interstate or foreign commerce at the time it is transported into Louisiana, and continues in interstate commerce, without interruption, until it is transported out of Louisiana or sold at wholesale for ultimate consumption within Louisiana. An equivalent tax is not imposed on gas produced in Louisiana and sold in interstate or intrastate commerce, which is permitted to enter interstate commerce without bearing the burden of the First Use Tax. Thus, the statute gives discriminatory tax advantages to owners of gas produced within the boundaries of the State of Louisiana, in comparison to owners of gas produced elsewhere.

XXVII.

The Louisiana First Use Tax on Natural Gas—Severance Tax Credit, LA. REV. STAT. ANN. §§ 47:647 (West Supp. 1979) (a copy of which is attached hereto as Exhibit "B" and incorporated herein by reference), permits an in-state producer of natural gas who is liable for the First Use Tax and who does not have an enforceable right of reimbursement to credit that liability, dollar-for-dollar, against its liability for the Louisiana severance tax (LA. REV. STAT. ANN. §§ 47:631-646) (West 1970 and Supp. 1979) up to the amount of such liability. The First Use Tax, applied in conjunction with the Severance Tax Credit, discriminates against interstate commerce because it favors taxpayers who own gas subject to the Louisiana severance tax, *i.e.,* taxpayers who are engaged in in-state production of natural resources, and burdens taxpayers who do not own such gas, *i.e.,* taxpayers who are not engaged in in-state production. The ultimate impact of this discrimination will fall on plaintiff states and their citizens, because under FERC Orders Nos. 10, 10-A, and 10-B the interstate pipeline companies will be allowed to pass through to consumers the amount of First Use Tax paid, and because other costs suffered by the pipelines, such as incomplete recovery of interest in the event the First Use Tax is ruled unconstitutional, may ultimately be found by FERC to be just and reasonable costs that are chargeable to the ratepayers under the Natural Gas Act.

XXVIII.

The First Use Tax discriminates against interstate commerce because it exempts from liability for the tax

volumes of natural gas, otherwise subject to the tax, consumed in specified uses in Louisiana, such as the manufacture of sulphur, fertilizer, and anhydrous ammonia. § 47:1303A. Volumes of natural gas subject to the tax consumed in similar uses in other states are not given a similar exemption. Louisiana has, therefore, favored certain in-state uses to the disadvantage of similar out-of-state uses.

E. The First Use Tax Is Not Fairly Related To Services Provided By Louisiana.

XXIX.

The First Use Tax is not fairly related to the express purpose of the statute, i.e., compensating the citizens of Louisiana for damage to Louisiana's "waterbottoms, barrier reefs, and sensitive shorelines" because of the movement of OCS or imported gas through the state. § 47:1301C. The disproportionate amount of the tax in relation to its avowed purpose demonstrates that the primary purpose of the tax is to raise revenue rather than to protect the environment. An equivalent tax is not imposed on natural gas produced in Louisiana, or on gas produced in any other state that imposes a severance or production tax on gas. Substantial volumes of natural gas produced in Louisiana and other states are transported into and through Louisiana in the same facilities used to transport OCS and imported gas. These volumes of gas traverse Louisiana's waterbottoms, barrier reefs, and shorelines, but are not subject to the First Use Tax. In addition, Louisiana has not imposed a similar tax on other forms of transportation, *i.e.*, barges and shipping, which also

"damage" Louisiana's waterbottoms, barrier reefs, and shorelines.

XXX.

The rate of First Use Tax is the same as the rate of the severance tax on gas produced within Louisiana, but the economic impact resulting from any first use as defined in the statute within the State of Louisiana is wholly disproportionate to the economic impact resulting from severance.

XXXI.

The impact of the First Use Tax on the pipelines upon whom it will be imposed varies without any rational relationship to: (1) the activities of the pipelines in the State; (2) the adverse impact of such activities on the State; or (3) the benefits received from the State by the pipelines.

SECOND CAUSE OF ACTION

XXXII.

Plaintiff realleges, as though set forth in full, the allegations contained in Paragraphs I through XVIII.

XXXIII.

The First Use Tax is in conflict with and repugnant to federal statutes and is accordingly void under the

supremacy clause, article VI of the United States Constitution, as is described in paragraphs XXXIV to XXXVII.

XXXIV.

The First Use Tax is in effect an attempt to regulate gas dedicated to interstate markets by contracts and/or FERC certificates of public convenience and necessity issued pursuant to the Natural Gas Act, 52 Stat. 821-33, 15 U.S.C. §§717-717w (1976), which is a matter within the exclusive jurisdiction of the Department of Energy and FERC.

XXXV.

The First Use Tax conflicts with and is repugnant to federal statutes, including the Natural Gas Act (52 Stat. 821-33, 15 U.S.C. §717-717w (1976)), the Natural Gas Policy Act of 1978 (92 Stat. 3350, Pub. L. No. 95-621 (1978)), and the Outer Continental Shelf Lands Act (67 Stat. 462-70, 43 U.S.C. §§1331-1343 (1976)), which constitute a comprehensive scheme duly adopted by Congress for the regulation, enforcement and promotion of the production of natural gas and the sale, transportation and pricing of interstate gas.

XXXVI.

Section 7(c) of the Natural Gas Act (56 Stat. 83, 15 U.S.C. §717f(c)) provides that no person may sell or transport natural gas in interstate commerce for resale without first obtaining a certificate of public convenience and necessity from FERC. These certificates are made in full

recognition of, and generally incorporate, the terms and conditions of the underlying contract for the sale of natural gas. Numerous contracts contain provisions requiring the producer or gatherer selling natural gas to an interstate pipeline to reimburse the pipeline for all costs (including any taxes) incurred as a result of extracting natural gas liquids or other treatment of the gas. The First Use Tax declares such contracts and the existing clauses requiring reimbursement "to be against public policy and unenforceable to that extent." §47:1303C.

XXXVII.

Section 4 of the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. § 1333(a)(2) (1976), provides that "[s]tate taxation laws shall not apply to the outer Continental Shelf." Notwithstanding the label given to it by Louisiana, the First Use Tax is in economic effect a tax on gas produced from the OCS.

THIRD CAUSE OF ACTION

XXXVIII.

Plaintiff realleges, as though set forth in full, the allegations contained in Paragraphs I through XVIII.

XXXIX.

The First Use Tax contravenes and violates article I section 10, clause 2 (import-export clause), of the United States Constitution, which provides, in pertinent part, that:

> No State shall . . . lay any Imposts or Duties on Imports . . . except what may be absolutely necessary for executing its inspection Laws. . . .

Insofar as the First Use Tax applies to gas imported into Louisiana from a foreign country, it violates this provision of the Constitution.

XL.

The First Use Tax clearly applies to the first use in Louisiana of gas imported into Louisiana from a foreign country, "which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country." §47:1303A. The United States does not now impose "any import tax or tariff" on natural gas imported into the United States. Natural gas may be imported into the United States free of any customs duties, 76 Stat. 72, 19 U.S.C. § 1202, Schedule 4, Part 10, Item 475.15 (1976).

XLI.

The First Use Tax is imposed upon, *inter alia,* the sale, transportation, transfer of possession or control, "or other ascertainable action at a point within the state." §47:1302(8). Insofar as it attempts to tax imported natural gas before it passes into the local distribution system for delivery to ultimate consumers, the First Use Tax is an illegal duty on imports.

XLII.

The First Use Tax complicates the Federal Government's foreign trade policy because it creates special preferences for certain domestic goods and because it will discourage importation of a product governed by federal regulation in a manner inconsistent with that regulation.

XLIII.

The First Use Tax will disturb the harmony among the states. It does not fall only upon activities with a reasonable nexus to the state; it is not fairly apportioned; it is discriminatory; and it does not fairly relate to services provided by the State of Louisiana.

XLIV.

The First Use Tax is a direct tax on imports in transit.

FOURTH CAUSE OF ACTION

XLV.

Plaintiff realleges as though set forth in full, the allegations contained in Paragraphs I through XVIII.

XLVI.

The First Use Tax contravenes and violates article I, section 10, clause 1, of the United States Constitution, which provides that "No State shall . . . pass any . . .

Law impairing the Obligation of Contracts . . ." Section 47:1303C states, in pertinent part:

> Any agreement or contract by which an owner of nautral gas at the time a taxable first use occurs claims a right to reimbursement or refund of such taxes from any other party in interest, other than a purchaser of such natural gas, is hereby declared to be against public policy and unenforceable to that extent.

Section 47:1303C will effectively void provisions in existing contracts for the sale of natural gas in interstate commerce that would otherwise require that owners of nautral gas subject to the First Use Tax be reimbursed by persons other than purchasers of the gas. This will in turn cause plaintiff state and their citizens to bear increased costs for natural gas.

Fifth Cause of Action

XLVII.

Plaintiff realleges, as though set forth in full, the allegations contained in Paragraphs I through XVIII.

XLVIII.

The First Use Tax deprives plaintiff state and its citizens of the equal protection of the law guaranteed under the fourteenth amendment of the Constitution of the United States.

XLIX.

By its Severance Tax Credit (Exhibit B hereto) Louisiana permits any taxpayer directly liable for the payment of the First Use Tax, and any taxpayer liable for the First Use Tax as a consequence of a reimbursement contract provision "applied in disregard" of section 1303C of the First Use Tax, to credit such payments against any severance taxes owed by the taxpayer to Louisiana. § 47:647A.

L.

The Severance Tax Credit further provides that the credit against severance taxes is not allowed if the taxpayer "has an enforceable right to reimbursement from a third party." § 47:647B.

LI.

Accordingly, under the Severance Tax Credit, the First Use Tax only applies to those taxpayers who have no liability from Louisiana's severance tax. A taxpayer otherwise liable under the First Use Tax may escape such tax liability by crediting such liability against severance taxes owed on its Louisiana production of natural resources.

LII.

The First Use Tax as amended by the Severance Tax Credit establishes a classification based on the question of whether the taxpayer is solely engaged in interstate OCS natural gas activity as distinct from the taxpayer

who is engaged in both interstate commerce and instate production. This classification is unreasonable and irrelevant to the purported purposes of the First Use Tax and it results in a denial of equal protection of the law in contravention of fourteenth amendment to the United States Constitution.

Wherefore, Plaintiff Respectfully Prays That This Court:

(a) Declare and adjudge, pursuant to 28 U.S.C. § 2201 (1976), that the Louisana First Use Tax is unconstitutional and unenforceable with respect to natural gas transported or sold in interstate or foreign commerce;

(b) Issue a permanent injunction prohibiting defendant and its agents and employees from collecting the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce;

(c) Issue a preliminary injunction, pending the final determination of this case, prohibiting defendant and its agents and employees from collecting the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce;

(d) Order that any and all revenues collected pursuant to the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce be refunded to the taxpayers together with interest thereon; and

(e) Grant plaintiff its costs herein expended and such other further relief as the Court may deem just and proper.

Respectfully submitted,

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EXHIBIT A

FIRST USE TAX ON NATURAL GAS

Act No. 294

House Bill No. 768

An Act to amend Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950 by adding thereto a new Chapter to be designated as Chapter 16 thereof to contain a Part I comprising Sections 1301 through 1307, providing for the levy and collection of a tax on the first use in the state of Louisiana, of natural gas produced outside of the territorial limits of the state of Louisiana, which is not subject to the levy of an import tax or customs duty by the United States as an import from a foreign country, and upon which no severance tax or tax upon the volume of production has been paid to any state or territory of the United States; providing a definition of first use and for other definitions; providing for exclusions from the tax; providing for the imposition and rate of the tax; declaring certain contractual agreements unenforceable; providing for the point at which the gas is measured and the tax assessed; providing for the reporting and collection thereof and promulgation of regulations; providing for commingling; providing penalties; providing for the disposition of the collections of the tax; and providing otherwise both generally and specifically with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. Chapter 16 of Subtitle II of Title 17 of the Louisiana Revised Statutes of 1950 containing a Part I

and comprising Sections 1301 through 1307 of Title 47 is hereby enacted to read as follows:

Chapter 16. First Use Tax

Part I. First Use Tax On Natural Gas

§ 1301. State policy

A. The conservation of natural resources is of vital concern to the present and future welfare of our state and nation, and it is the policy of the state of Louisiana, in the exercise of its police and taxing power, to prevent the physical and economic waste of its natural resources. It is recognized that other existing laws providing limitations upon the production of oil and gas are allowed within the state, and the impositon of a tax upon the severance of these natural resources from the soil and water of the state fail to prevent the economic waste of these Louisiana natural resources and will unfairly tax Louisiana producers in a discriminatory fashion, unless the state equally and uniformly taxes the introduction for the first time into the economy of the state natural gas which has not been otherwise or elsewhere subject to taxation by or within the United States.

B. The waterbottoms, barrier islands and coastal areas within this state are also valuable natural resources, as they provide essential habitat for many forms of wildlife and aquatic life in Louisiana, help protect our coastline from erosion, and are of aesthetic, commercial and recreational value to the citizens of our state and nation. It is further recognized that while other existing laws, applicable to the production of oil and natural gas, provide

recompense in the form of taxes to the people of the state of Louisiana for adverse effects on the natural resources, barrier islands, waterbottoms, and shorelands of this state, these laws fail to provide protection for such valuable natural resources or compensation to the people of Louisiana for the necessary adverse effects caused by entry for use for the first time in Louisiana, under the protection of the state's laws, of natural gas which has not been subject to taxation otherwise or elsewhere by or within the United States unless the state levies an equitable tax thereon.

C. It is one of the express purposes of this tax to require the exaction of fair and reasonable compensation to the citizens of this state for the costs incurred and paid with public funds, which costs enure solely to the benefit of the owners of natural gas produced beyond the boundaries of Louisiana, although introduced into the state, and to provide some measure of reimbursement to the citizens for damages to the State's waterbottoms, barrier reefs, and sensitive shorelands as a direct consequence of activity within the state associated with such natural gas by the owners thereof.

§ 1302. Definitions

The definitions hereinafter set forth shall have the meanings ascribed to them unless the context of use clearly indicates otherwise:

(1) "Oil, condensate, distillate or similar hydrocarbons" are liquid hydrocarbons remaining in a liquid state at 15.025 pounds per square inch absolute and sixty degrees Fahrenheit.

(2) "Natural gas" is natural or casinghead gaseous phase hydrocarbons remaining after separation from either oil, condensate, or distillate and measured at a pressure base of 15.025 pounds per square inch absolute at a temperature base of sixty degrees Fahrenheit.

(3) "Processing" is the scrubbing of a natural gas stream by specifically applied mechanical processes of absorption, adsorption, compression, cooling, cryogenics, refrigeration or any combination thereof for the purpose of extracting natural or casinghead gasoline, methane, ethane, propane, butane and other liquefiable hydrocarbons.

(4) "Refining" is the process by which crude oil, distillate and condensate are separated or fractionated into the various component parts or purified.

(5) "Storage" means and includes any keeping or retention in this state of oil and natural gas.

(6) "Measurement" is any process by which the volume of natural gas affected by this Part is determined.

(7) "Sale" is the transfer of ownership of and title to natural gas from one person to another for valuable consideration.

(8) "Use" is: the sale; the transportation in the state to the point of delivery at the inlet of any processing plant; the transportation in the state of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; transfer of possession or relinquishment of control at a delivery point in the state; processing for the extraction of liquefiable compo-

nent products or waste materials; use in manufacturing; treatment; or other ascertainable action at a point within the state.

(9) "Owner" is the person or person having title to and the right to alienate the natural gas subject to the tax at the time a use occurs in the state. It shall not include any person to whom temporary possession or control has been transferred. In the event of a sale the purchaser shall be deemed the owner.

§ 1303. Imposition; exclusions; commingling

A. Pursuant to the exercise of the police and taxing powers of the state for the purpose of preventing economic and physical waste of our natural resources and for protecting and providing compensation for adverse effects upon the state's shorelands, waterbottoms and barrier islands, there is hereby levied and imposed a tax upon the first occurrence within this state of any use, as defined in this Part, of any natural gas upon which no severance tax or tax upon the volume of production has been paid, or is legally due to be paid, to this state or any other state or territory of the United States, or which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country. The tax levied herein shall not apply to natural gas otherwise subject thereto when such gas is used or consumed in the drilling for or production of oil, natural gas, sulphur, or in the processing of natural gas for liquids extraction within the state; nor shall it apply to gas shrinkage volumes attributable to the extraction of ethane, propane, butanes, natural or casinghead gasoline or other liquefied hydrocarbons, provided shrinkage volumes shall

not exceed equivalent gas volumes of the extracted liquids computed by recognized conversion factors used by the Gas Processors Association nor shall it apply to natural gas used or consumed in the manufacture of fertilizer and anhydrous ammonia within the state.

B. The tax imposed by Subsection A of this Section shall be computed at a rate of seven cents on each unit of natural gas as to which a use first occurs within the state. For the purposes of this tax a unit shall be one thousand cubic feet of natural gas as measured at a pressure base of 15.025 pounds per square inch absolute and at a temperature base of sixty degrees Fahrenheit.

C. In furtherance of the public policy and purpose set forth in Section 1301 of this part, and particularly Subsection C of said Section, this tax shall be deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas. Any agreement or contract by which an owner of natural gas at the time a taxable use first occurs claims a right to reimbursement or refund of such taxes from any other party in interest, other than a purchaser of such natural gas, is hereby declared to be against public policy and unenforceable to that extent. Notwithstanding any such agreement or contract, such an owner shall not have an enforceable right to any reimbursement or refund on the basis that this tax constitutes a cost incurred by such owner by virtue of the separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, or that this tax constitutes any other grounds for reimbursement or refund under such agreement or contract, unless there has been a final and unappealable judicial determination that such owner is entitled to such reimbursement or re-

fund, notwithstanding the public policy and purpose of this part and the foregoing provisions of this Subsection C. In any legal action pursuant to this Subsection, the state shall be an indispensable party in interest.

D. When natural gas subject to the tax levied in this Part is commingled with oil and/or natural gas not subject to the tax levied herein, it shall be presumed that the volumes withdrawn from the commingled mass by the first use shall be in the same ratio as the ratio of the resources entering the commingled mass.

E. Nothing in this Part shall be construed as imposing any tax on the production, severance, or ownership of natural gas produced outside of the boundaries of the state of Louisiana, it being the intention of this Part that the incidence of this tax shall not be upon the natural gas nor upon the property or rights from which it is produced, but rather shall be only upon the privilege of performance or allowing the performance, by the owner, of the enumerated actions comprising first use within the state.

F. If any use as defined in this Part and first occurring is determined not to be a constitutionally taxable incident, the tax shall be imposed upon the use first occurring thereafter.

§1304. Authority of the collector of revenue to promulgate rules and regulations

The collector of revenue is authorized to promulgate rules and regulations necessary to effect the intent and purpose of this Part, including regulations concerning the

measurement of products associated with the incidents taxed herein.

§1305. Reports and payments; reimbursement limitations

A. The owner or owners of the natural gas at the time a use first occurs in this state shall file with the Department of Revenue and Taxation on or before the last day of each month following the month of first use, statements on forms procured from the department, showing the volumes, values, owners and such other information as the department may require by law or regulation for computing and assessing the amount of tax due under this Part.

B. The taxes levied by this Part shall be due and payable to the Department of Revenue and Taxation monthly on or before the last day of the month following the month to which the tax is applicable by the owner or owners of the natural gas stream at the time any use, as defined herein, first occurs within the state.

§1306. Delinquent tax; failure to report or pay

A. The tax provided by this Part shall become delinquent after the date fixed for each monthly report to be filed in the office of the collector, and from such time shall be subject to the addition of interest, penalties, and costs as provided in Chapter 18, Subtitle II of this Title.

B. The failure to report or pay, within ninety days, in the manner and at the time required herein, the tax imposed by this Part on the first use of natural gas is un-

lawful, and the natural gas shall be deemed illegal gas subject to the provisions of R.S. 30:19 and, as such, shall be treated as contraband and shall be seized and sold as provided by R.S. 30:20.

§ 1307. Disposition of collections

The secretary shall remit all collections of taxes provided by this Part each month to the state treasurer, not later than the tenth day of the month following the month in which collections are made. The state treasurer shall credit all such collections to the state treasury.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

This Act shall become effective immediately upon signature by the governor and the adoption by the legislature of House Bill 140 of the 1978 Regular Session; provided however that taxes shall not begin to accrue on natural gas subject to the tax levied by this Part until 7:00 A.M. on April 1, 1979.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

Section 4. Notwithstanding the provisions of Section 2 of this Act, in the event that a final and unappealable judicial decision is rendered upholding the right of an owner to enforce a contract or agreement otherwise ren-

dered unenforceable by R.S. 47:1303(C) of this Act, the following consequences shall ensue:

(1) If the right upheld arises from the provisions of a contract or agreement requiring any other party to reimburse or refund to an owner taxes incurred by such owner by virtue of the separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, then the tax levied in this Act shall not be due in respect to natural gas previously and thereafter sold pursuant to any contract or agreement containing such requirement, and the secretary of the Department of Revenue and Taxation shall forthwith return to each taxpayer all taxes previously paid in respect to such natural gas, together with interest at the rate of six percent per annum from the date the taxes were paid; or

(2) If the right upheld arises from the provisions of a contract or agreement requiring any other party to reimburse or refund to an owner costs or expenses incurred by such owner by virtue of separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, then this Act shall be null and void and the secretary shall forthwith return to each taxpayer all taxes previously paid, together with interest at the rate of six percent per annum from the date of payment.

All taxpayers receiving refunds and interest pursuant to this Section shall in turn remit such refunds and interest to all other parties from whom they have received payments pursuant to the aforesaid provisions of such contracts.

Approved July 6, 1978.

EXHIBIT B

FIRST USE TAX ON NATURAL GAS—

SEVERANCE TAX CREDIT

Act No. 436

House Bill No. 1187

An Act to amend Chapter 6 of Title 47 of the Louisiana Revised Statutes of 1950 by adding thereto a new Part I-B, to be comprised of R.S. 47:647; to provide a severance tax credit to persons liable for the payment of the first use tax levied in R.S. 47:1301 through R.S. 47:1307; to provide for the amount of the tax credit; to provide for parish allocations; to provide for regulations; and otherwise to provide with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. Part 1-B of Chapter 6 of Title 47 of the Louisiana Revised Statutes of 1950, consisting of R.S. 47:647 is hereby enacted to read as follows:

PART I-B. SEVERANCE TAX CREDIT

§ 647. Severance tax credit.

A. Every taxpayer liable for and remitting taxes levied and collected pursuant to R.S. 47:1301 through 1307 and each taxpayer who bears such taxes as a direct result of contractual terms or agreements applied in disregard of R.S. 47:1303C, shall be allowed a direct tax credit, at any time following payment of such tax, but, not in excess of the amount which must be borne by such taxpayer, against

severance taxes owed by such taxpayer to the state, the amount of which credit shall not exceed the amount of severance taxes for which such taxpayer is liable to the state as a direct consequence of the privilege of severing natural resources from the surface of the soil or water of the state. A taxpayer who bears any portion of the tax levied pursuant to R.S. 47:1301 through 1307 as a direct result of contractual terms or agreements applied in disregard of R.S. 47:1303C, shall be entitled to a credit under this Section only after there has been a determination by the Louisiana Supreme Court or the appropriate United States District Court that such taxpayer must bear the tax, provided that if the taxpayer or the state has sought and been denied a preliminary injunction enjoining the application of such contractual terms or agreements sought to be rendered inapplicable by R.S. 47:1303 (C), then such taxpayer shall be entitled to a credit under this Section from the date of denial of the preliminary injunction.

B. No tax credit pursuant to this Section shall be allowed for any taxes remitted pursuant to R.S. 47:1301 through 1307 for which a taxpayer has an enforceable right to reimbursement from a third party. A taxpayer claiming any credit under this Section shall furnish to the secretary of the Department of Revenue and Taxation all applicable contracts and other information requested by the secretary, which relate to such taxpayer's possible right to reimbursement. If the secretary determines that the taxpayer has an enforceable right to reimbursement, which the taxpayer is not actually receiving, the secretary shall so rule. Within thirty days of receipt of notice of such ruling the taxpayer shall have the right to appeal such ruling to the Louisiana Board of

Tax Appeals which board shall determine in open meeting whether there is sufficient evidence to support the ruling of the secretary. If the board determines that there is not sufficient evidence it shall overrule the secretary and the taxpayer shall not be required to take any other action in order to receive the tax credit provided by this Section. If the board determines that there is sufficient evidence, the taxpayer shall thereafter have a period of ninety days within which to institute any administrative or judicial proceedings necessary to assert such right to reimbursement. The taxpayer shall pursue such administrative or judicial proceedings with due diligence. At all times prior to commencement of such administrative or judicial proceedings and during the pendency thereof, and during any appeals therefrom, the taxpayer shall continue to be entitled to the credit provided in this Section; provided that if no action is taken by the taxpayer to assert the right to reimbursement within ninety days no further credit shall be granted and the state shall have the right to recover from the taxpayer any credits granted prior to the expiration of such time. If it is determined in any administrative proceedings that a taxpayer has no right to such reimbursement, then the taxpayer shall not be entitled to continue receiving the credit allowed by this Section, unless the taxpayer within the time allowed by applicable law seeks judicial review of such administrative determination and pursues such judicial review to a final and unappealable judgment. If the administrative or judicial determination establishes that the taxpayer has an enforceable right to reimbursement of the taxes levied pursuant to R.S. 47:1301 through 1307, and if the taxpayer is so reimbursed, then such taxpayer shall be liable to the state for additional severance taxes equi-

valent to the amount of taxes levied under R.S. 47:1301 through 1307 for which such taxpayer has received reimbursement. The taxpayer shall also pay to the state interest on such taxes at the rate prescribed in R.S. 47:-1601, accruing from the date on which the credit attributable to such taxes was taken to the date of final payment but only to the extent of any interest which the taxpayer has itself received on the amount of reimbursement.

C. The credit allowed by this Section shall not affect the percentage allocation of severance tax proceeds otherwise due to any parish, and the secretary of the Department of Revenue and Taxation, with the concurrence of the state treasurer shall, by regulation, establish such procedures as may be deemed necessary to provide therefor.

D. The secretary of the Department of Revenue and Taxation shall promulgate rules and regulations necessary for the implementation and administration of the tax credit provided for herein.

Section 2. Notwithstanding the provisions of R.S. 47:-1351, the treasurer shall, after any funds have first been deposited to the credit of the Bond Security and Redemption Fund, pay into the general fund, from the total proceeds of the first use tax authorized by R.S. 47:1301 through 1307, such amounts as are necessary to fully reimburse said general fund for tax credits granted pursuant to this Act.

Section 3. Tax credits authorized by this Act shall not be granted until there has been a final decision upholding the validity of the first use tax authorized and levied

pursuant to R.S. 47:1301 through 1307, except to the extent that taxes levied pursuant to said Part are collected without either protest or suit for recovery filed directly by the person claiming the credit. In the event that tax credits authorized under this Act are granted, the recipient thereof shall be deemed to have waived his right to recovery of any taxes paid and collected pursuant to R.S. 47:1301 through 1307 to the extent of the tax credit granted.

Section 4. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

Section 5. All laws or parts of laws in conflict herewith are hereby repealed.

Section 6. The provisions of this Act shall become effective upon the enactment into law of House Bill 768 of the 1978 Regular Session of the Louisiana Legislature.

Approved July 10, 1978.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND, STATE OF ILLINOIS, STATE OF INDIANA, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF NEW YORK, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, AND STATE OF WISCONSIN,

Plaintiffs,

vs.

STATE OF LOUISIANA,

Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND FOR LEAVE TO FILE COMPLAINT

Jurisdiction

This is a suit between sovereign States, and is within the exclusive original jurisdiction of this Court under

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article III, section 2, clauses 1 and 2 of the United States Constitution and 28 U.S.C. §1251(a)(1). The State of New Jersey brings its motion pursuant to Rules 9 and 35 of the Rules of the Supreme Court and Rule 24(b) of the Federal Rules of Civil Procedure for leave to intervene and to file a complaint in this Court.

Question Presented

Whether the State of New Jersey has sufficient interest in the subject matter of this suit so as to permit it to intervene as a party?

Argument

This action presents questions of law which are of great concern to the country. In essence, the matter before this Court deals with the attempt of one State, in the guise of a tax, to exploit the energy needs and concerns of other States in violation of the United States Constitution. Plaintiffs herein are challenging the constitutionality of the Louisiana First Use Tax on Natural Gas ("the First Use Tax")[1] and have invoked the original jurisdiction of this Court. New Jersey, as a sovereign State, moves to intervene as a party plaintiff.

Intervention by sovereign governmental bodies should be allowed where declaratory and injunctive relief is sought from actions which affect them. *State of Illinois ex rel. Scott* v. *Butterfield,* 396 F. Supp. 632, 636 (N.D. Ill. 1975). Intervention by a sovereign State is particularly appropriate in circumstances where the threatened in-

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[1] La. Rev. Stat. Ann. §§47:1301-1307 (West Supp. 1979).

vasion of the State's rights and the effect upon the State's economy is of serious magnitude. Not only do these rights come into play when a boundary or navigation channel is disputed, but energy needs as well are a high priority in this age of shortage. When the issues in the litigation are so related to the interests of a state that the "just, orderly and effective determination of such issues" requires that all interested parties appear before the Court, *U.S.* v. *Louisiana,* 354 U.S. 515, 516 (1957), the Court should exercise its general equity powers and grant leave pursuant to Rule 24 of the Federal Rules of Civil Procedure for such an interested party to intervene.

The issues at bar severely affect the State of New Jersey. As a Northeastern State, New Jersey produces no natural gas itself and is forced to purchase this vital natural resource from gas-producing states such as Louisiana. In an age of rapidly rising oil costs New Jersey and its citizens turn more and more to natural gas as a cost-efficient method of fueling industry and residences. New Jersey has, in recent years, imported 90 per cent of its natural gas supplies from Louisiana.[2] Preliminary figures available show that 68.8 per cent of this gas comes from the Outer Continental Shelf, and will be subject to the First Use Tax. The most recent estimate of the total volume of pipeline gas purchased in New Jersey is 295 billion cubic feet; of that volume, approximately 203 billion cubic feet will be subject to the First Use Tax, affecting over 1,800,000 citizens of the State who are gas-using customers and ratepayers. In addition, New Jersey citizens have been at an ever-increasing rate

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[2] *1975 Gas Flow Patterns,* Federal Energy Regulatory Commission (1977).

converting their heating systems from oil to gas in an effort to lower their utility bills and conserve energy.

New Jersey purchases natural gas as well for its own uses and those of its instrumentalities. In fiscal year 1979, the total amount paid by the State of New Jersey for natural gas was 29 thousand dollars. Approximately 20 thousand dollars of that sum can be attributed to gas which is presently subject to the First Use Tax. The total estimated cost to New Jersey, its instrumentalities and its citizens of the First Use Tax is 17 million dollars annually. Such a direct and indirect economic impact alone justifies New Jersey's application for leave to intervene in the case at bar, which will determine whether a substantial portion of the State's financial resources, and that of its citizens, must be committed in the future to paying the State of Louisiana and perhaps other states for the privilege of having gas transported to its borders.

New Jersey's claim involves questions of law and fact identical to those presented by plaintiffs herein. Numerous cases have permitted intervention under Rule 24 of the Federal Rules of Civil Procedure where such common questions have been of similar or lesser importance than those presented herein. *See,* e.g., *Natural Resources Defense Council, Inc.* v. *TVA,* 240 F. Supp. 400, 408 (1971), rev'd on other grounds 459 F.2d 255 (2d Cir. 1972) (allowing the Audobon Society to intervene in a strip mining case); *Doe* v. *Scott,* 310 F. Supp. 688, 689 (N.D. Ill. 1970) (allowing a pregnant student to intervene in a constitutional challenge to Illinois abortion statute); *see also* 7A Wright & Miller, Federal Practice and Procedure: Civil §1911.

Additionally, the motion presented herein is timely, even though the issue has been joined by Louisiana's answer. The granting of the motion would not unduly de-

lay or prejudice the rights of the original parties. New Jersey's interests are substantially the same as the other plaintiffs and no additional issues of law will be presented for the Court's consideration. The complaint proposed herein is substantially identical than that which the Court has approved for filing by the present plaintiffs. The issues are well-known to all parties and neither the plaintiffs nor the defendant would be unfairly surprised by the complaint. As well, any other action which New Jersey would seek as a means of resolving these questions would most likely be stayed pending a decision in this case. *See FERC* v. *McNamara* (Civil Action No. 78-384, U.S.D.C., M.D. La., Appeal docketed No. 79-1403 (5th Cir. 1979), dealing with the same issues.

CONCLUSION

The State of New Jersey, both in its individual capacity and on behalf of its citizen, has a demonstratable and pressing interest in the litigation pending before this Court. The allegations stated in the proposed complaint are substantially similar and raise common questions of law and/or fact with those presented by plaintiffs. Therefore, the Court should grant New Jersey's motion for leave to intervene and for leave to file its complaint.

Respectfully submitted,

STATE OF NEW JERSEY
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Attorney General of New Jersey

STEPHEN SKILLMAN
Assistant Attorney General

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Deputy Attorney General

CLAUDE E. SALOMON
Deputy Attorney General

Certificate of Service

BERTRAM P. GOLTZ, Deputy Attorney General representing the State of New Jersey, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 19th day of October, I served copies of the Motion for Leave to Intervene and File Complaint, Complaint and Brief in support of said Motion by mailing three copies thereof in duly addressed envelopes, with postage prepaid to:

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All parties required to be served have been served.

BERTRAM P. GOLTZ, JR.
Deputy Attorney General

No. 83, Original

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF MARYLAND, ET AL., PLAINTIFFS

v.

STATE OF LOUISIANA

MOTION FOR LEAVE TO INTERVENE AS PLAINTIFFS, COMPLAINT IN INTERVENTION, AND MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS PLAINTIFFS

WADE H. McCREE, JR.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 83, Original

STATE OF MARYLAND, ET AL., PLAINTIFFS

v.

STATE OF LOUISIANA

MOTION FOR LEAVE TO INTERVENE AS PLAINTIFFS

The United States and the Federal Energy Regulatory Commission, by the Solicitor General, move for leave to intervene as plaintiffs in this action and to file the attached complaint in intervention on the ground that the United States is directly affected by the additional costs imposed by the Louisiana First Use Tax in its capacities as a consumer of natural gas in the operation of military and civilian installations and as a lessor under leases authorizing various persons to produce natural gas from federal enclaves and the Outer Continental Shelf.

Moreover, the First Use Tax directly conflicts with the authority of the Federal Energy Regulatory Commission to regulate the interstate sale and transportation of natural gas and the cost and rates of pipelines, including the apportionment of costs among producers, processors, and consumers of natural gas. These interests can

adequately be protected only if the United States and the Federal Energy Regulatory Commission are parties to the action.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1980

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 83, Original

STATE OF MARYLAND, ET AL., PLAINTIFFS

v.

STATE OF LOUISIANA

COMPLAINT IN INTERVENTION

I.

The jurisdiction of this Court is invoked under Section 1251(b)(2) of Title 28 of the United States Code.

II.

Plaintiff States seek a declaratory judgment that the Louisiana First Use Tax on Natural Gas (Act No. 294, 1978 La. Sess. Law. Serv. 482 (West)), is unconstitutional and an order permanently restraining the collection of the tax and compelling the refund of all revenues collected plus all interest earned on such revenues (Complaint at 6 para. II).

III.

Pursuant to Rule 42(4) the United States and the Federal Energy Regulatory Commission filed a brief *amici curiae* in support of the plaintiffs' motion for leave to file the complaint. On June 18, 1979, this Court granted the plaintiffs' motion for leave to file the complaint invoking the original jurisdiction of this Court.

On March 3, 1980, the Court appointed John F. Davis, Esquire, Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings.

IV.

Paragraphs III-XIV of the Complaint, describing the parties and the operation of the Louisiana First Use Tax, are adopted and incorporated herein by reference.

V.

Paragraphs XV-XXXII of the Complaint, describing the impact of the Louisiana First Use Tax upon the Plaintiff States and their citizens, are adopted and incorporated herein by reference.

VI.

The United States is a consumer of natural gas in the operation of military and civilian installations and is thereby directly affected by the additional costs imposed by the Louisiana First Use Tax.

VII.

The United States is the lessor under leases authorizing various persons to produce natural gas from federal enclaves and the Outer Continental Shelf, over which it has exclusive jurisdiction (see 43 U.S.C. 1331-1343). It is believed that if the federal government's lessees are subject to Louisiana First Use Tax, the revenues received by the United States from its leases will be significantly reduced.

VIII.

Under Article I, Section 8, clause 3 of the Constitution, the federal government is responsible for the regulation of interstate and foreign commerce.

The Louisiana First Use Tax violates the Commerce Clause insofar as it burdens natural gas moving in interstate commerce, is not applied to activities with a sufficient nexus with Louisiana, is not fairly apportioned, and is not fairly related to either the value of identifiable activities within the state, the taxpayer's investment in facilities within the state, its gross income from business or the percentage of business conducted within the state, or the length of the facilities or the distance traveled within the state.

The Louisiana tax also discriminates against interstate commerce. While Louisiana has prohibited the purchasers of gas subject to the tax from shifting it to the producer, it does not prohibit purchases of gas subject to its severance tax from shifting all or part of the tax to the producer. By prohibiting the shifting of the First Use Tax and allowing the shifting of the severance tax, Louisiana has imposed a tax on Outer Continental Shelf, federal enclave, and imported gas, which is greater than the tax imposed on gas produced within Louisiana.

The Louisiana First Use Tax discriminates against interstate commerce by requiring out-of-state consumers to bear the entire burden of the levy. This discrimination is accomplished by a system of credits (La. Rev. Stat. Ann. §§ 47:1303, 47:647 (Cum. Supp.)) designed to ensure that gas that is consumed in Louisiana or that is subject to the Louisiana severance tax bears a lesser tax burden. Thus, Louisiana users and users of gas extracted within Louisiana enjoy a distinct commercial advantage in the form of lower prices for natural gas.

IX.

Under Article VI, clause 2, of the Constitution, "This Constititution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Under the Natural Gas Act, 15 U.S.C. 717-717w, and the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3351, the Federal Regulatory Commission is responsible for the regulation of the interstate sale and transportation of natural gas and the cost and rates of pipelines, including the apportionment of costs among producers, processors, and consumers of natural gas.

The Louisiana First Use Tax conflicts with the federal regulation of the sale and transportation of natural gas in interstate commerce and is therefore invalid under the Supremacy Clause of the Constitution. The principal impact of the tax is to increase the price of gas extracted from federally-leased areas on the Outer Continental Shelf and from federal enclaves, and of gas imported from abroad and shipped through Louisiana in interstate commerce. Since Congress by the Natural Gas Act and the Natural Gas Policy Act has vested in the Federal Energy Regulatory Commission the exclusive authority to set rates for the sale and transportation of such natural gas in interstate commerce, the Louisiana tax is incompatible with the federal regulatory scheme.

Wherefore, the United States and the Federal Energy Regulatory Commission respectfully pray that the Court:

(a) declare and adjudge, pursuant to 28 U.S.C. 2201, that the Louisiana First Use Tax is unconstitutional with respect to natural gas transported or sold in interstate or foreign commerce;

(b) permanently enjoin and prohibit defendant and its agents and employees from collecting the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce;

(c) order that all revenues collected pursuant to the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce be refunded to the taxpayers together with interest thereon; and

(d) grant such relief as the Court may deem appropriate and necessary to protect the interests of the United States and the Federal Energy Regulatory Commission.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1980

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 83, Original

STATE OF MARYLAND, ET AL., PLAINTIFFS

v.

STATE OF LOUISIANA

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AS PLAINTIFFS

In our brief *amici curiae* of June 1979 in support of the plaintiffs' motion for leave to file a complaint and our brief *amici curiae* of November 1979 in support of plaintiffs' motion for judgment on the pleadings, we advised the Court that both the United States and the Federal Energy Regulatory Commission are directly affected by the Louisiana First Use Tax on Natural Gas.

As a consumer of natural gas in the operation of military and civilian installations, the United States is directly affected by the additional costs imposed by the First Use Tax. The United States is also the lessor under leases authorizing various persons to produce natural gas from federal enclaves and the Outer Continental Shelf, over which it has exclusive jurisdiction. If the federal government's lessees are compelled to pay the First Use Tax, the revenues reserved by the United States from these leases could be significantly affected. Finally, the Louisiana First Use Tax conflicts with the federal regulation of the sale and transportation of natural gas in interstate commerce and is therefore invalid under the

Supremacy Clause. The impact of the Louisiana tax is to increase the price of gas extracted from federally-leased areas on the Outer Continental Shelf and from federal enclaves or of gas imported from abroad and shipped through Louisiana in interstate commerce. Since Congress by the Natural Gas Act and the Natural Gas Policy Act has vested in the Federal Energy Regulatory Commission the exclusive authority to set rates for the sale and transportation of such natural gas in interstate commerce, the Louisiana tax is incompatible with the federal regulatory scheme.

At the time the plaintiffs moved for judgment on the pleadings, we supported their motion on the grounds that their claims were correct as a matter of law and that the resolution of the questions presented did not require the appointment of a Special Master. However, on March 3, 1980, the Court granted Louisiana's motion for appointment of a Special Master. At the preliminary meeting held on March 21, 1980, the Special Master indicated that some evidentiary hearing might be necessary and expressed the tentative view that only parties to this suit would be entitled to present evidence. Therefore, in light of the federal interests involved and the possibility that the United States may wish to introduce evidence in the case, intervention by the United States and the Federal Energy Regulatory Commission is appropriate to insure that the federal interests are fully protected.

CONCLUSION

For the reasons stated, the motion for leave to intervene as plaintiffs and to file the complaint in intervention should be granted.

Respectfully submitted,

WADE H. McCREE, JR.
Solicitor General

APRIL 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Number 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

VERSUS

STATE OF LOUISIANA,

Defendant

OPPOSITION TO MOTION FOR LEAVE TO INTERVENE WITH ACCOMPANYING BRIEF

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All parties required to be served have been served.

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IN THE

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STATE OF MARYLAND,
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VERSUS

STATE OF LOUISIANA,

Defendant

OPPOSITION TO MOTION FOR LEAVE TO INTERVENE

NOW COMES the State of Louisiana, Defendant in the above entitled matter, and in response to the Motion of Columbia Gas Transmission Corporation, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Florida Gas Transmission Company, Michigan Wisconsin Pipe Line Company, Mississippi River Transmission Corporation, Natural Gas Pipeline Company of America, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Sea Robin Pipeline

Company, Southern Natural Gas Company, Tennessee Gas Pipeline Company (a Division of Tenneco Inc.), Texas Eastern Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, and United Gas Pipe Line Company, for leave to intervene as Plaintiffs, while expressly reserving the right to file a response to the Complaint of Intervenors should the intervention be allowed, respectfully shows:

1.

Movants may not intervene of right for the reasons that:

(1) They are without a statutory right to intervene; and

(2) Movants' interest is adequately represented by existing parties.

2.

Movants should not be permitted to intervene for the reasons that:

(1) There is no independent basis of jurisdiction with regard to Movants' claim; and

(2) The interest of Movants is being actively asserted by them in the Louisiana State Courts, the jurisdiction of which is adequate and appropriate to adjudicate the claim of the Movants.

3.

The intervention would permit a suit against the State of Louisiana by citizens of other states in contravention of the Eleventh Amendment.

The Motion for Leave to Intervene should be denied.

All of the above and foregoing is thus respectfully submitted.

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STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
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STATE OF WISCONSIN,

Plaintiffs

VERSUS

STATE OF LOUISIANA,

Defendant

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO INTERVENE

Although the views of MOVANTS COLUMBIA GAS TRANSMISSION CORPORATION, a Delaware corporation, CONSOLIDATED GAS SUPPLY CORPORATION, a West Virginia corporation, EL PASO NATURAL GAS COMPANY, a Delaware corporation, FLORIDA GAS TRANSMISSION COMPANY, a Delaware corporation, MICHIGAN WISCONSIN PIPE LINE COMPANY, a Delaware corporation, MISSISSIPPI RIVER TRANSMISSION CORPORATION, a Delaware corporation, NATURAL GAS PIPELINE COMPANY OF AMERICA, a Delaware corporation, NORTHERN NATURAL

GAS COMPANY, a Delaware corporation, PANHANDLE EASTERN PIPE LINE COMPANY, a Delaware corporation, SEA ROBIN PIPELINE COMPANY, an unincorporated joint venture between United Offshore Company [a Delaware corporation] and Southern Deepwater Pipeline Company [a Delaware corporation], SOUTHERN NATURAL GAS COMPANY, a Delaware corporation, TENNESSEE GAS PIPELINE COMPANY, a Division of Tenneco, Inc., a Delaware corporation, TEXAS EASTERN TRANSMISSION CORPORATION, a Delaware corporation, TEXAS GAS TRANSMISSION CORPORATION, a Delaware corporation, TRANSCONTINENTAL GAS PIPE LINE CORPORATION, a Delaware corporation, TRUNKLINE GAS COMPANY, a Delaware corporation, and UNITED GAS PIPE LINE COMPANY, a Delaware corporation, have heretofore been expressed in an *amici curiae* brief as filed on the 18th day of May, 1979,[1] they now seek to intervene.

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1. Other private companies have also expressed their views in *amici curia* briefs. *Amicus curiae* brief of American Gas Association filed May 16, 1979; *amicus curiae* brief of the State of Alabama filed May 25, 1979; *amicus curiae* brief of Associated Gas Distributors - Baltimore Gas and Electric Company, Bay State Gas Company, The Berkshire Gas Company, Boston Gas Company, Bristol & Warren Gas Company, The Brooklyn Union Gas Company, Cape Cod Gas Company, Central Hudson Gas & Electric Corporation, Chesapeake Utilities Corporation, City of Holyoke, Massachusetts, Gas & Electric Department, City of Westfield Gas & Electric Light Department, Commonwealth Gas Company, Concord Natural Gas Corporation, The Connecticut Gas Company, Consolidated Edison Company of New York, Inc., Delmarva Power & Light Company, Elizabethtown Gas Company, Fall River Gas Company, Fitchburg Gas & Electric Light Company, Haverhill Gas Company, Long Island Lighting Company, Lowell Gas Company, Lynchburg Gas Company, Manchester Gas Company, New Bedford Gas & Edison Light Company, New Jersey Natural Gas Company, New York State Electric & Gas Corporation, Northern Utilities, Inc., The Pequot Gas Company, Philadelphia Electric Company, Philadelphia Gas Works, Providence Gas Company, Public Service Company of North Carolina, Inc., Public Service Electric & Gas Company, Rochester Gas & Electric Corporation, South County Gas Company, South Jersey Gas Company, The Southern Connecticut Gas Company, Tiverton Gas Company, UGI Corporation, Valley Gas Company and Washington Gas Light Company filed May 25, 1979. Additionally an *amici curiae* brief was filed on behalf of the United States and the Federal Energy Regulatory Commission on June 12, 1979.

No attempt has been made to label the requested intervention as one of right or permissive. It is neither for they are without a statutory right of intervention; they have failed to assert inadequate representation;[2] they are not a state and therefore have no independent basis to invoke this Court's original jurisdiction;[3] and Movants are already actively pursuing their asserted claims in other fora which are adequate and appropriate.[4]

Movants, by their proposed Complaint, seek to sue Louisiana without having obtained Louisiana's consent, either express or implied. Such an action is barred by the Eleventh Amendment.

---

2. This is understandably so in that the Complainants are presently represented by the combined efforts of eight Attorneys' General.

3. "* * * But as this court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies, and parties over which the Constitution and laws have authorized it to act, any proceeding without the limits prescribed is *coram non judice*, and its action a nullity. (10 Peters, 474; S. P., 4 Russ., 415). And whether the want or excess of power is objected by a party or is apparent to the court, it must surcease its action or proceed extrajudicially." *The State of Rhode Island and Providence Plantations v. The Commonwealth of Massachusetts*, 12 Peters 657 at 717 (1838).

4. On September 22, 1978, Edwin W. Edwards, Governor of the State of Louisiana; William J. Guste, Jr., Attorney General of the State of Louisiana; and Shirley McNamara, Secretary of the Department of Revenue and Taxation of the State of Louisiana, filed a petition for declaratory judgment as to the constitutionality of Louisiana's First Use Tax. All of the Movants were named as defendants. This proceeding was docketed under Number 216,867, Division F, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana. Along wtih Movants' answer filed on the 26th day of February, 1979, a reconventional demand was filed by all of the Movants except Mississippi River Transmission Corporation. The very same allegations as those set forth in Movants' proposed Complaint herein were set forth in said reconventional demand. Movants attempted to remove this state court proceeding to the Federal Court. A motion to remand filed on behalf of the plaintiffs was granted. This decision may be found in 464 F. Supp. 654 (USDC MD LA. 1979). Thereafter, and on the 22nd day of June, 1979, the Movants brought an action against Shirley McNamara, Secretary, Louisiana Department of Revenue and Taxation, The Louisiana Department of Revenue and Taxation, and The State of Louisiana, under Docket Number 225,553, Division D, in Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana. In this proceeding, the very same allegations as those set forth in Movants' proposed Complaint herein are set forth in their petition.
[footnote continued on next page]

CONCLUSION

The motion to intervene should be denied for "***What a [party] cannot do directly in the mode pointed out by law, he shall not be permitted to do collaterally by evasion." *Voorhees et al. v. Jackson, ex. dem. The Bank of the United States,* 10 Peters 449 at 474 (1836).

All of the above and foregoing is thus respectfully submitted.

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[footnote continued from previous page]
These cases pose the question of the right of state officers to collect state taxes, as provided by state law, in state courts. The state taxing statute which is here called in question has never been interpreted by a court of Louisiana. It has long been held that the most appropriate place to initiate action to determine the constitutionality and validity of state taxes is in the state courts. See *Matthews v. Rogers,* 284 U.S. 521 (1931); *The Tax Injunction Act,* 28 U.S.C. Sec. 1341; and *Great Lakes Dredge and Dock Co. v. Huffman,* 319 U.S. 293 (1943). "When Federal questions arise in cases pending in the state courts, those courts are competent, and it is their duty, to decide them." *Arkansas v. Kansas & Texas Coal Co.,* 183 U.S. 185, at 191 (1901).

CERTIFICATE OF SERVICE

I, ROBERT G. PUGH, one of the attorneys for the State of Louisiana in the above-entitled proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 24th day of September, 1979, I served copies of the opposition to motion for leave to intervene with accompanying brief, by mailing three copies thereof in duly addressed envelopes, with postage prepaid, to:

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IN THE

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STATE OF WISCONSIN,

Plaintiffs

VERSUS

STATE OF LOUISIANA,

Defendant

BRIEF OF STATE OF LOUISIANA IN OPPOSITION TO MOTION OF NEW JERSEY FOR LEAVE TO INTERVENE AND TO FILE COMPLAINT

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December 3, 1979

MID-SOUTH PRESS · SHREVEPORT, LOUISIANA

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BRIEF OF STATE OF LOUISIANA IN OPPOSITION TO MOTION OF NEW JERSEY FOR LEAVE TO INTERVENE AND TO FILE COMPLAINT

The State of Louisiana opposes the motion of the State of New Jersey for leave to intervene and to file complaint.

The complaint that New Jersey seeks to file is virtually identical to the complaint that has been filed in these proceedings by the eight plaintiff States — the States of Maryland, Illinois, Indiana, Massachusetts, Michigan, New York, Rhode Island, and Wisconsin. The proposed complaint is therefore subject to the same jurisdictional, standing, and prudential

problems that adhere to the complaint that this Court has allowed the eight States to file.

There is now pending before the Court a motion by the State of Louisiana to dismiss the complaint of these eight States for various jurisdictional and standing reasons. That motion also incorporates a prudential reason for dismissing the complaint, i.e., the pendency in the Louisiana courts of a tax refund suit that puts into issue the identical federal constitutional questions concerning the Louisiana First Use Tax statute that the plaintiff States seek to adjudicate before this Court. All of these jurisdictional, standing, and prudential considerations apply with equal force to the complaint New Jersey proposes to file. Accordingly, Louisiana opposes New Jersey's motion for leave to intervene and to file another defective complaint.

1. *None of these threshold problems have been resolved by the Court order allowing the eight States to file a complaint.*

On June 18, 1979, the Court entered a summary order granting leave to the eight States to file their joint bill of complaint. Leave was granted without reference to the various objections raised in Louisiana's opposition to the motion for leave to file.

In no event can the June 18 order, which was unaccompanied by any explanatory opinion, be deemed an acknowledgement by this Court that it has jurisdiction over the complaint filed by the eight States. Nor can the order be deemed an adjudication that there are no standing or other prudential factors that would make it inappropriate to exercise original jurisdiction in this instance. All these matters remain open to challenge by the State of Louisiana in its pending motion to dismiss that complaint. And all these matters remain open for use in assessing whether New Jersey should be granted leave to file its

proposed complaint. Denial of leave is dictated by the following considerations:

(1) Original proceedings before this Court frequently follow no set procedural pattern. On occasion the Court may use the motion for leave to file a complaint as the occasion for adjudicating, through a written opinion, various jurisdictional, standing, or prudential problems that have been raised. See, e.g., *Arizona v. New Mexico*, 425 U.S. 794 (1976); *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976). Alternatively, the Court may grant a state leave to file a complaint "as of course," despite jurisdictional and other objections, leaving such objections to be renewed and adjudicated in a subsequent motion to dismiss the filed complaint. See, e.g., *Kansas v. United States*, 204 U.S. 331, 337 (1907); *United States v. West Virginia*, 295 U.S. 463, 467 (1935). Obviously, the latter alternative has been followed in these proceedings.

(2) Allowing a complaint to be filed by a state, without more, does not create a jurisdictional precedent. In cases on the appellate docket, where review has been had in this Court on the merits without mention of any jurisdictional problems, the Court has consistently noted that such action "is no basis for considering it as authoritative on the jurisdictional issue, it being the firm policy of this Court not to recognize the exercise of jurisdiction as precedent where the [jurisdictional] issue was ignored." *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 137, n.2 (1947), and cases cited.

So too in this case, the mere fact that the complaint of the eight States has been ordered filed by this Court is no reason for considering the filing order as an authoritative precedent, or as *res judicata*, on any jurisdictional, standing, or prudential proposition that was raised or that might have been raised. Only an express ruling on such matters could put them to rest.

(3) Supplementing these considerations is the historic doctrine that jurisdictional issues can be raised — and even renewed — at any time and at any stage in a proceeding. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 536-537 (1962). There is no reason or policy that dictates that a court, having accepted a case for review or entertained the filing of a complaint, must continue to exercise jurisdiction over the case once it becomes evident that jurisdiction is lacking or that continued exercise of jurisdiction would be imprudent. Particularly is that true where, as here, new developments have occurred that augment the impropriety of continuing the case on the docket.

In short, this Court has unquestioned power to consider the jurisdictional, standing, and prudential objections to the filing of another complaint by the State of New Jersey. Nothing in the Court's order of June 18, 1979, forecloses that consideration or mandates the filing of the proposed complaint.

2. *Jurisdictional, standing, and prudential considerations warrant denial of leave to file the proposed complaint.*

Since the various threshold objections contained in Louisiana's motion to dismiss the complaint of the eight States are fully applicable to the effort of New Jersey to file an identical kind of complaint, the objections can be quickly recapitulated.

A. *Availability of an alternative forum*

The decision in *Arizona v. New Mexico*, 425 U.S. 794 (1976), which culminates a line of decisions starting with *Massachusetts v. Missouri*, 308 U.S. 1 (1939), enunciates the policy of this Court not to exercise its original jurisdiction where there is another forum with jurisdiction over the parties in interest, where the issues tendered in this Court may be litigated, and where appropriate relief may be had.

The instant situation is on all fours with that involved in *Arizona v. New Mexico*. Here the seventeen private pipeline companies involved in this suit, like the three utilities involved in the *Arizona* case, have filed an appropriate action in the Louisiana state courts that raises all the federal constitutional objections that New Jersey here asserts with respect to the Louisiana First Use Tax statute. Here, as in the *Arizona* case, that action "provides an appropriate forum in which the *issues* tendered here may be litigated . . . [and in which, should the Louisiana courts hold the statute unconstitutional, New Jersey] will have been vindicated." 425 U.S. at 797. The appropriateness of the Louisiana tax refund procedure invoked by the seventeen pipeline companies, in terms of justifying the non-exercise of original jurisdiction, has been fully recognized by this Court in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 296-297 (1943).

It would be specious to suggest, as the eight States have done, that this Court first obtained jurisdiction over the subject matter of New Jersey's complaint by its June 18 order permitting the filing of the complaint of the eight States, and that this Court must therefore hold and maintain jurisdiction to the exclusion of the Louisiana state courts. Cf. *Ex parte Young*, 209 U.S. 123, 161-162 (1908). As noted in Part I of this opposition, the June 18 order did not constitute an assumption by this Court of jurisdiction over this original proceeding. And in no event can the freedom of this Court not to exercise original jurisdiction in a given case be circumscribed by a time lag in invoking the jurisdiction of another suitable forum. This Court's original jurisdiction is not an "alternative to the redress of grievances which could have been [timely] sought" in other forums. *Illinois v. Michigan*, 409 U.S. 36, 37 (1972). Nor is the exercise of this Court's original jurisdiction the prize for

winning any race to the courthouses.[1]

The appropriateness of the pending tax refund suit in the Louisiana courts is further highlighted by the fact that it affords an opportunity for the real parties in interest to confront each other. As was true of the private utilities in the *Arizona* case, 425 U.S. at 798, the legal incidence of the use tax in question is upon the seventeen pipeline companies, not upon New Jersey or the other States. The pipeline companies, as the real taxpayers in interest, cannot qualify as parties before this Court under its original jurisdiction, nor can they secure from this Court any tax refund relief. But such standing and such relief are available in the Louisiana state courts, from which appellate review by this Court would of course be available. New Jersey, like the eight plaintiff States, is free to intervene or otherwise participate in these Louisiana state court proceedings to assert and protect whatever interest it may have, if any.[2]

B. *The absence of jurisdiction*

The complaint that New Jersey proposes to file does not

1. Any such argument that this Court must assume jurisdiction since its jurisdiction was the first to be invoked overlooks the fact that the jurisdiction of two other lower courts were invoked, as to the identical constitutional issues here involved, *prior* to this Court's order of June 18, 1979, and indeed prior to the filing on March 29, 1979, of the motion of the eight States for leave to file their complaint. Those two cases are:
   (1) On September 22, 1978, the State of Louisiana instituted a declaratory judgment action in the Nineteenth Judicial District Court in and for East Baton Rouge Parish, Louisiana, No. 216,867, *Edwards, et al. v. Transcontinental Gas Pipeline Corp., et al.* 464 F.Supp. 654 (1979).
   (2) On September 29, 1978, the Federal Government instituted an action in the United States District Court for the Middle District of Louisiana, No. 78-384, *Federal Energy Regulatory Commission v. McNamara, et al.* See appendix to Louisiana's brief in support of motion to dismiss.
2. On June 22, 1979, four days after the entry of this Court's order of June 18, the same seventeen private pipeline companies that seek to intervene as plaintiffs in the instant original proceeding filed the tax refund suit in the Nineteenth Judicial District Court in and for East Baton Rouge Parish, Louisiana, Docket No. 225,533, *Southern Natural Gas Co., et al. v. McNamara.* Pertinent portions of the complaint in that tax refund suit are reproduced in the appendix to the brief of the State of Louisiana in opposition to the brief of the United States and the Federal Energy Regulatory Commission as amici curiae.

allege any cause of action within the purview of this Court's original jurisdiction under Article III, Section 2, clauses 1 and 2, and 28 U.S.C. §1251(a)(1). Those constitutional and statutory provisions confer jurisdiction on this Court to hear and determine cases and controversies "between two or more States." The jurisdictional defect here is that New Jersey has alleged no "controversy" with the State of Louisiana.

New Jersey asserts in its proposed complaint (paragraph X) that the Louisiana First Use Tax that it seeks to challenge "will be required to be paid by interstate natural gas pipeline companies." There is no assertion that Louisiana has sought to impose this tax upon New Jersey or any other state. There is no assertion that Louisiana decreed that its tax be passed on from the pipeline companies to the State of New Jersey or its citizens. In other words, there is no assertion of any kind of interest or concern on New Jersey's part other than that the First Use Tax, presumably as the result of the authorization from the Federal Energy Regulatory Commission permitting the pipeline companies to pass along to consumers the cost of the tax, has an "impact" upon the price paid by the gas consumers in New Jersey, "with resulting economic burdens and hardship" (paragraph XV).

New Jersey in effect has conceded that it has no more than the indirect interest that every consumer has in the imposition of a tax that is ultimately reflected in the higher price paid by the consumer for a particular commodity. The very indirectness of this interest belies its character as an Article III controversy. Unless a plaintiff State can allege that it has a "direct interest in the particular property or rights immediately affected or to be affected," *Oklahoma v. Atchison, T.&S.F.R. Co.*, 220 U.S. 277, 286 (1911), no controversy with a defendant State has been asserted.

Moreover, New Jersey has not alleged that the economic injury for which it seeks redress "was directly caused by the

action of another State," *Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976). The line of causation between the imposition of the use tax and the higher prices paid by the ultimate gas consumers was irretrievably broken by the voluntary actions of the pipeline companies in seeking and gaining federal authorization to pass the cost of the tax on to the consumers. The resulting indirectness of the injury to the consumers drains the proposed complaint of the requisite "direct causation" that marks an Article III controversy.

The absence of any true "controversy" between New Jersey and Louisiana further reflects the fact that there is no generally recognized cause of action by an ultimate consumer seeking to protest the imposition of some tax or burden on the manufacturer that is passed on to the consumer in the form of higher retail prices. In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Court refused to read into the federal antitrust laws any such "pass-on theory" as a basis for a cause of action. There appears to be even less justification for reading the "pass-on theory" of a cause of action into the Article III concept of a case or controversy for original jurisdictional purposes.

C. *The absence of standing*

The inability of New Jersey to allege its own "controversy" with Louisiana leads to the final defect in the proposed complaint, the lack of New Jersey's standing to protest the imposition of a Louisiana use tax on gas owners.

It is now common ground in this tax litigation that the real parties in interest are the pipeline taxpayers and the tax-levying State of Louisiana. Neither the State of New Jersey nor its gas-consuming citizens are the direct targets in the imposition of Louisiana's First Use Tax. The interests of New Jersey both as a gas-consuming state entity and as *parens patriae* for its gas-consuming citizens, stem not from the imposition of the

use tax but from the economic burdens resulting from the "pass-on" by the taxpaying pipeline companies of the cost of the tax.

As is true with respect to the eight States that have filed a complaint, New Jersey is seeking to place itself in the untenable position of standing in as a "volunteer" for the pipeline companies and protesting the tax laid upon those pipeline companies. What New Jersey and the other States are seeking to do is to act as surrogates for private taxpayers in their protests against state tax levies, and to utilize this Court's original jurisdiction to accommodate and protect the real and direct interests of the private taxpayers. New Jersey simply has no standing before this Court to make such private taxpayer claims. And this Court has consistently refused to permit a complaining State to proceed with an original suit once it appears that it is actually suing on behalf of private interests or individual taxpayers rather than on behalf of the direct interests of the State, either as sovereign or *parens patriae*. See *New Hampshire v. Louisiana*, 108 U.S. 76 (1883); *Louisiana v. Texas*, 176 U.S. 1, 16 (1900); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 392-393 (1938); *Massachusetts v. Missouri*, 308 U.S. 1 (1939); *Arkansas v. Texas*, 346 U.S. 368 (1953); *Illinois v. Michigan*, 409 U.S. 36 (1972); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664-666 (1976).

Indeed, the efforts of the private pipeline taxpayers to assert their direct interests on all judicial fronts serve to demonstrate conclusively the indirect nature of the interests of New Jersey and the other States. The taxpayers have instituted a tax refund suit in the Louisiana state court, which is the proper and adequate forum for airing and resolving the real interests at stake. More than that, however, the private taxpayers have sought to intervene in these original proceedings not simply to air their tax concerns but to file their own complaint.

The State of Louisiana has protested this effort by private taxpayers to use the original jurisdiction of this Court as a vehicle for securing redress of their private tax complaints. This Court has never exercised original jurisdiction under Article III to consider such private claims. *United States v. Texas*, 143 U.S. 621, 643-644 (1892). But apart from that jurisdictional void, the obvious ability of the private taxpayers to assert their tax claims in constitutional terms in the proper state court forum renders it completely unnecessary for New Jersey to act as a volunteer surrogate in this Court for the assertion of those private claims. New Jersey, in short, simply has no cognizable standing in this Court to assert a private taxpayer's constitutional objections to a use tax.[3]

All these considerations lead back inevitably to the proposition that the availability of the Louisiana tax refund procedure makes it unnecessary for this Court to continue further with this original action. Indeed, by allowing the real parties in interest to resolve their problems in the tax refund suit, this Court need not address the serious jurisdictional and standing issues that New Jersey's proposed complaint presents. New Jersey's motion for leave to file another complaint can be denied simply by reference to the prudential principles set forth in *Arizona v. New Mexico*, 425 U.S. 794 (1976).

CONCLUSION

For any and all of the foregoing reasons, the motion of the State of New Jersey for leave to intervene and to file complaint should be denied.

3. New Jersey's fourth cause of action in its proposed complaint (par. XLVI) is a particularly flagrant instance of New Jersey's lack of standing to assert the constitutional rights of third parties not before this Court. It is there alleged that a provision of the Louisiana First Use Tax statute impairs the obligation of contracts entered into by the producers of natural gas and the owners of the gas at the time of a taxable first use. New Jersey, of course, is not a party to such contracts.

All the above and foregoing is thus respectfully submitted.

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I, ROBERT G. PUGH, one of the attorneys for the State of Louisiana in the above-entitled proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 3rd day of December, 1979, I served copies of the foregoing Brief of State of Louisiana in Opposition to Motion of State of New Jersey for Leave to Intervene and to File Complaint by mailing three copies thereof in duly addressed envelopes, with postage prepaid, to:

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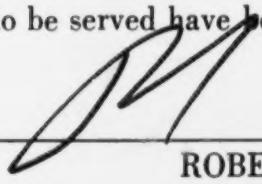

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND, *et al.*,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

RESPONSE OF INDICATED PIPELINE COMPANIES TO LOUISIANA'S OPPOSITION TO THEIR MOTION FOR LEAVE TO INTERVENE

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v.

STATE OF LOUISIANA,

Defendant.

RESPONSE OF INDICATED PIPELINE COMPANIES TO LOUISIANA'S OPPOSITION TO THEIR MOTION FOR LEAVE TO INTERVENE

STATEMENT

On August 28, 1979, seventeen interstate pipeline comanies[1] filed their joint motion for leave to intervene as plaintiffs in this action. In their brief in support of their

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[1]The pipeline companies seeking intervention, all interstate natural gas companies, are Columbia Gas Transmission Corporation, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Florida Gas Transmission Company, Michigan Wisconsin Pipe Line Company, Mississippi River Transmission Corporation, Natural Gas Pipeline Company of America, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Sea Robin Pipeline Company, Southern Natural Gas Company, Tennessee Gas Pipeline Company, a Division of Tenneco Inc., Texas Eastern Transmission Corporation, Texas Gas Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, and United Gas Pipe Line Company.

motion they advanced four basic reasons why they, as the persons upon whom Louisiana's First Use Tax on Natural Gas is levied, should be permitted to intervene, viz:

1. They have significantly protectable interests at issue in this case;

2. Their intervention is appropriate to permit their participation in the resolution of issues directly affecting their interests;

3. Their intervention is necessary in order that their interests be adequately represented; and

4. Decisions of this Court support the granting of such intervention.

On September 24, 1979, the State of Louisiana filed an opposition to the pipeline companies' motion, asserting that (a) the pipeline companies have no statutory basis for intervention and their interests were adequately represented by the eight plaintiff-consumer states; (b) the pipeline companies should not be permitted to intervene because there is no independent basis of jurisdiction with regard to their claim and they are actively asserting their interests in proceedings pending in the Louisiana state courts; and (c) their intervention in this action would be tantamount to a suit against the State of Louisiana in contravention of the Eleventh Amendment.

All contentions of Louisiana but the final one—the Eleventh Amendment issue—are fully and dispositively answered in the brief heretofore filed by the pipeline companies in support of their motion to intervene.

ARGUMENT

I. THE ELEVENTH AMENDMENT DOES NOT BAR INTERVENTION BY THE PIPELINE COMPANIES

The State of Louisiana has by statute expressly waived Eleventh Amendment immunity[2] in actions challenging the validity of taxes claimed to violate, *inter alia,* the Constitution of the United States. Moreover, intervention by the pipeline companies in this proceeding is consistent with the policy underlying the Eleventh Amendment because the relief sought is prospective and will not have any effect on the State's treasury.

A. Waiver

Louisiana's waiver is by virtue of La. R.S. 47:1576, which provides in pertinent part:

> **A.** A right of action is hereby created to afford a remedy at law for any person aggrieved by the prohibition of courts restraining the collection of tax . . .
>
> **B.** This Section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter, for a full and complete adjudication of any and all questions arising

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[2]The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

in the enforcement of this Subtitle as to the legality of any tax accrued or accruing or the method of enforcement thereof. In such action, service of process upon the collector shall be sufficient service, and he shall be the sole necessary and proper party defendant in any such suit.

C. This Section shall be construed to provide a legal remedy in the state or federal courts, by action at law, in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress or the United States Constitution, or the Constitution of the State of Louisiana, or in any case where jurisdiction is vested in any of the courts of the United States.

It has long been established that a state may, by statute or otherwise, validly consent to be sued in federal court and thereby waive the immunity provided by the Eleventh Amendment. *See, e.g., Petty v. Tennessee-Missouri Bridge Comm'n,* 359 U.S. 275 (1959); *Ford Motor Co. v. Dep't of Treasury,* 323 U.S. 459 (1945). Unquestionably, Section 1576 represents a legislative decision to waive immunity to suit in federal courts regarding the subject matter of this case.[3]

Section 1576A provides aggrieved taxpayers with a procedural due process remedy to obtain relief from invalid or illegal taxes in federal courts. Section 1576B provides that it "shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter" for questions concerning the legality of a tax or the method of enforcement thereof. Section C repeats

[3]The Louisiana legislature is specifically empowered to authorize any suits against the State. La. Const. Art. XII, § 10(B) (1974).

the critical language concerning the creation of "a legal remedy in the state or federal courts" with respect to claims that a taxing statute is, *inter alia*, an unlawful burden on interstate commerce, or otherwise unconstitutional. The repeated authorization of suits in federal court is a clear indication of Louisiana's "intention to submit its fiscal problems to other courts than those of its own creation . . .",[4] *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 54 (1944), thus meeting the test for a valid statutory waiver of Eleventh Amendment immunity as set forth in the *Great Northern* case. *Accord: Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577 (1946); *J. Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894).

The United States Court of Appeals for the Fifth Circuit has consistently recognized Section 1576 as constituting a valid waiver of Louisiana's Eleventh Amendment immunity. *See Mississippi River Fuel Corp. v. Cocreham*, 382 F.2d 929 (5th Cir. 1967), (*cert. den.*, 390 U.S. 1014 (1968); *Mouton v. Sinclair Oil & Gas Co.*, 410 F.2d 717 (5th Cir. 1979), *cert. den.*, 398 U.S. 957 (1970); *United Gas Pipe Line Co. v. Whitman*, 595 F.2d 323 (5th Cir. 1979)[5]

The waiver of immunity contained in Section 1576 is extremely broad—clearly broad enough to encompass the

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[4]Although no legislative history of La. R.S. 47:1576 (originally Act 330 of 1938) exists, it was apparently passed to eliminate the issuance of interlocutory injunctions. *See A. Sulka & Co. v. City of New Orleans*, 208 La. 585, 23 So.2d 224 (1945). Certainly, it is evident from the language of the statute that the legislature desired to confer rather than avoid federal jurisdiction.

[5]In *United Gas*, the court dismissed a Section 1576 suit on grounds which did not affect its recognition of that section as a waiver of Louisiana's Eleventh Amendment immunity.

pipeline companies and the subject matter of their intervention. The State of Louisiana has wholly failed to establish an Eleventh Amendment impediment to such intervention.

B. The Policy Underlying the Eleventh Amendment

Although originally the Eleventh Amendment was read literally, *e.g., Osborn v. Bank of the United States,* 22 U.S. (9 Wheat.) 738 (1824), courts later began to give primary consideration to the policies underlying the amendment, *e.g., Hans v. Louisiana,* 134 U.S. 1 (1890); *see* Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies about Federalism,* 89 Harv. L. Rev. 682, 684-85 (1976). The current policy is that reflected in *Edelman v. Jordan,* 415 U.S. 651 (1974). As set out in that decision, the Eleventh Amendment is directed against suits seeking to impose a liability which must be paid from the general revenues of a state rather than suits seeking prospective relief against unconstitutional actions, even though such suits may have an ancillary effect on the state's treasury. The result sought in the instant case comports with the policy inherent in the Eleventh Amendment because it avoids any economic effect upon the state treasury. The relief requested here is prospective only, and any taxes that have been paid are not in the state's treasury subject to appropriation by the legislature but rather are held in escrow, subject to refund.

It should be emphasized that this case is not one for specific performance of a contract with a state, nor is it an application for a writ of mandamus requiring judicial

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[6] *Ex parte Ayers,* 123 U.S. 443 (1887).

interference in state fiscal affairs.[7] There is no request fror the enforcement of a penal provision,[8] and no decision will require the expenditure of funds from a state treasury, directly or indirectly.[9] Thus, even had Louisiana not consented to suit in federal court, the nature of this suit does no violence to the policies exemplified by the Eleventh Amendment. The pipeline companies seek no more than prospective relief from the exaction of illegal taxes, a remedy consistently characterized by the Court as outside the Eleventh Amendment prohibition, *e.g., Georgia R. R. & Banking Co. v. Redwine,* 342 U.S. 299, 304 (1952).

II. INTERVENTION IS WARRANTED UNDER ALL APPLICABLE PRINCIPLES

In its brief (page 3) Louisiana chides the pipeline companies for failing to "label the requested intervention as one of right or permissive", but as the pipeline companies have shown in their brief in support of intervention (page 11), there is no express rule governing intervention in original actions in this Court. "Where their application is appropriate", the Federal Rules of Civil Procedure "may be taken as a guide to original actions in this Court". Rule 9(2) of this Court. Consequently, there is no need for the pipeline companies to show that intervention is either of right or permissive, rather it is sufficient that they show that intervention is appropriate on any basis and their brief in support of intervention clearly makes such a showing. Indeed, taking as their guide Rule 24 of the Federal Rules of Civil Procedure, establishing the requirements for

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[7] *Louisiana v. Jumel,* 107 U.S. 711 (1883).

[8] *Employees v. Dep't of Pub. Health & Welfare,* 411 U.S. 279 (1973).

[9] *Edelman v. Jordan, 415 U.S. 651 (1974).*

intervention in the district courts, the pipeline companies demonstrated, in their brief in support of intervention, that they unquestionably satisfy the policy considerations underlying Rule 24— both of right, as

> ". . .when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties," Rule 24(a) (2);

and permissively, as

> ". . .when an applicant's claim or defense and the main action have a question of law or fact in common . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties," Rule 24(b) (2).

Significantly, Louisiana raises no question about the adequacy of these showings. Consequently, it is not necessary to reiterate here the many practical considerations advanced by the pipeline companies in their brief (pages 11-18) which demonstrate their substantial proprietary and other interests which may be adversely affected unless they are permitted to intervene.

Louisiana also makes the bald assertion (page 3 of its brief) that the pipeline companies "have failed to assert inadequate representation", and it considers this supposed deficiency as "understandably so in that the Complainants

are presently represented by the combined efforts of eight Attorneys' [sic] General".

Although the ultimate objective of the plaintiff states in this action is the same as that of the pipeline companies—to have Louisiana's First Use Tax declared invalid—the attorneys general of those states do not, of course, represent the interests of the pipeline companies. Indeed, contrary to Louisiana's assertion, the pipeline companies clearly demonstrated (pages 19-22 of their brief) not only that their interests "are not adequately represented by [the] plaintiffs" but that the pipeline companies actually represent additional, distinct and in certain respects broader interests than do the plaintiffs, and that their participation should contribute significantly to the efficient resolution of this case.

The remaining contention of Louisiana, that the pipeline companies are already actively pursuing their claims in certain state court proceedings pending in Louisiana (page 3 of its brief), does not detract from the propriety of the pipeline companies' intervening in this proceeding. In so urging, Louisiana ignores the fact that it is the plaintiff states which are the principal plaintiffs here, and as to them, it is clear, as pointed out in the amicus brief filed by the United States and the Federal Energy Regulatory Commission (page 12), that such pending state court proceedings do not provide an appropriate vehicle for decision of the issues raised by them. On the other hand, since the issues raised by the plaintiff states overlap in some measure with those raised by the pipeline companies in the state court proceedings, the pendency of those actions is another good reason for permitting the pipeline companies to intervene here, where this Court is called upon to make

the ultimate disposition with respect to the validity of the tax in question. The proceeding in this Court provides a single, superior vehicle for the resolution of all disputes concerning all parties. If the pipeline companies are not permitted to intervene here, protracted, duplicative and unnecessary litigation will continue in the Louisiana courts.

Finally, the question is not whether the pipeline companies have an adequate remedy in another forum to challenge the constitutionality of the tax, but rather whether, given the existence of this suit in this Court, the intervenors' interests which must be affected are so critical as to require their presence. The answer is clearly affirmative. Adoption of Louisiana's argument that the pipeline companies should not be permitted to intervene in the very suit which ultimately will decide the constitutional questions affecting their rights and interests, and which will have a dispositive affect on the suits brought in Louisiana by the state *against* the pipeline companies and by the pipeline companies *against* the state, is tantamount to precluding the pipeline companies from protecting their rights and interests in any forum.

CONCLUSION

It is again respectfully submitted that the pipeline companies' motion for leave to intervene should be granted.

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CERTIFICATE OF SERVICE

I, Daniel F. Collins, a member of the Bar of this Court, do hereby certify that three (3) copies of the foregoing "Response of Indicated Pipeline Companies to Louisiana's Opposition to their Motion for Leave to Intervene" were served upon each other party separately represented in this proceeding by depositing said copies in the United States mail, properly addressed, with airmail postage prepaid, pursuant to Rule 33 of the Rules of this Court, this 9th day of October, 1979.

_____

Daniel F. Collins

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Number 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

VERSUS

STATE OF LOUISIANA,

Defendant

MOTION FOR APPOINTMENT OF A SPECIAL MASTER

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August 17, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Number 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

VERSUS

STATE OF LOUISIANA,

Defendant

MOTION FOR APPOINTMENT OF A SPECIAL MASTER

Defendant, the State of Louisiana, respectfully moves the Court to appoint some suitable person as special master in this cause and to refer this cause to him with authority to take the evidence and to report the same to the Court with his findings of fact, conclusions of law and recommendations for decree, all to be subject to approval or other disposal by this Court.

In support of this motion, defendant calls the attention of this Court to the pleadings an inspection of which discloses

many issues of fact which cannot conveniently be tried except by the appointment of a special master.

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CERTIFICATE OF SERVICE

I, ROBERT G. PUGH, one of the attorneys for the State of Louisiana in the above-entitled proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that, on the 17th day of August, 1979, I served copies of the motion for appointment of a special master, by mailing three copies thereof in duly addressed envelopes, with postage prepaid, to:

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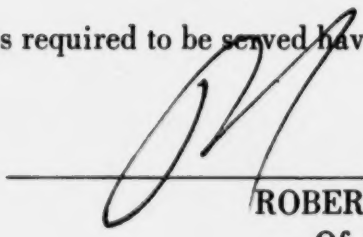
All parties required to be served have been served.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs,

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STATE OF LOUISIANA,

Defendant.

ANSWER TO MOTION FOR APPOINTMENT OF A SPECIAL MASTER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
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COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

ANSWER TO MOTION FOR APPOINTMENT OF A SPECIAL MASTER

The State of Maryland, the State of Illinois, the State of Indiana, the Commonwealth of Massachusetts, the State of Michigan, the State of New York, the State of Rhode Island and Providence Plantations, and the State of Wisconsin ("the plaintiff states"), by their attorneys, in answer to the motion for the appointment of a special master, state that the motion is premature and should be denied for the following reasons:

1. The plaintiff states filed a motion for judgment on the pleadings and supporting brief on September 18, 1979.

2. The issues raised by the motion of the plaintiff states are purely legal and thus may be decided appropriately on the basis of the pleadings. *See, e.g., Douglas v. Seacoast Products,* 431 U.S. 265, 271-72 (1977); *Philadelphia v. New Jersey,* 430 U.S. 141 (1977); *United States v. Louisiana,* 363 U.S. 1 (1960) (all indicating that the determination of a supremacy clause issue presents a purely legal question); *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977) (commerce clause violation found even in the absence of a record).

3. The urgency of the issues raised by this case; the enormous burden that Louisiana's First Use Tax places on the plaintiff states and their citizens — in excess of one-quarter billion dollars annually — which is not adequately addressed by the possibility of refunds, *FPC v. Tennessee Gas Transmission Company,* 371 U.S. 145, 154-55 (1962); and the possible spectre of interim retaliatory state taxation in response to Louisiana's First Use Tax, all require that this Court expeditiously decide this case without the appointment of a special master. *See South Carolina v. Katzenbach,* 383 U.S. 301, 307 (1966) (dispensing with the appointment of a master in an original jurisdiction case to resolve important questions under the Voting Rights Act of 1965).

WHEREFORE, having fully answered the motion for the appointment of a special master, the plaintiff states urge that the motion is premature and should be denied

and that oral argument be set on the plaintiff states' motion for judgment on the pleadings.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND, *et al.*,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

MOTION OF INDICATED PIPELINE COMPANIES FOR LEAVE TO FILE ANSWER TO MOTION FOR APPOINTMENT OF A SPECIAL MASTER AND ANSWER TO MOTION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND, *et al.*,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

MOTION OF INDICATED PIPELINE COMPANIES FOR LEAVE TO FILE ANSWER TO MOTION FOR APPOINTMENT OF A SPECIAL MASTER

The pipeline companies indicated in the footnote[1] hereby respectfully move the Court for leave to file the

[1]Columbia Gas Transmission Corporation, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Florida Gas Transmission Company, Michigan Wisconsin Pipe Line Company, Mississippi River Transmission Corporation, Natural Gas Pipeline Company of America, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Sea Robin Pipeline Company, Southern Natural Gas Company, Tennessee Gas Pipeline Company, a Division

attached answer to the motion of the State of Louisiana for appointment of a special master.

The pipeline companies have filed a motion for leave to intervene in this proceeding demonstrating that they have a vital interest in the various issues presented herein. However, the Court has not yet acted on this motion by the pipeline companies.[2] Accordingly, inasmuch as the Court's action upon the instant motion of the State of Louisiana for the appointment of a special master may have an impact upon the future course of this proceeding, the pipeline companies respectfully urge that they should be permitted to file the attached answer so that the Court may be apprised of their views in connection with its disposition of that motion.

---

of Tenneco Inc., Texas Eastern Transmission Corporation, Texas Gas Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company and United Gas Pipe Line Company.

[2]Louisiana has filed an opposition to the motion of the pipeline companies for leave to intervene. The pipeline companies will shortly file a response to that opposition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND, *et al.*,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

ANSWER OF INDICATED PIPELINE COMPANIES TO MOTION FOR APPOINTMENT OF A SPECIAL MASTER

The indicated pipeline companies[1] respectfully submit that the motion of the State of Louisiana for appointment of a special master should be denied at this time.

[1]Columbia Gas Transmission Corporation, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Florida Gas Transmission Company, Michigan Wisconsin Pipe Line Company, Mississippi River Transmission Corporation, Natural Gas Pipeline Company of America, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Sea Robin Pipeline Company, Southern

1. The plaintiff states have moved the Court for judgment on the pleadings and the pipeline companies will shortly file a similar motion. As shown in these motions, the Louisiana First Use Tax on Natural Gas, La. R.S. 47: 1301–1307, violates the Supremacy and Commerce Clauses of the Constitution (art. VI, cl. 2 and art. I, sec. 8, respectively), and therefore must be set aside as unconstitutional. Notwithstanding the assertion of the State of Louisiana (Motion at p. 2), this case can be disposed of by the Court summarily and without the development of an evidentiary record. *See, e.g., Douglas* v. *Seacoast Products Inc.*, 431 U.S. 265, 272 (1977).

2. Consideration of the motion for appointment of a special master is premature at this time and action thereon should be deferred pending resolution of the motions for summary disposition filed by the plaintiff states and to be filed by the pipeline companies.

3. The very magnitude of the tax (an estimated $275,000,000 annually), and its immediate impact upon the pipeline companies and their customers, require that the Court dispose of this case summarily and without appointment of a special master.

WHEREFORE, for the foregoing reasons, the pipeline companies urge that Louisiana's motion for appointment of a special master be deferred.

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CERTIFICATE OF SERVICE

I, Daniel F. Collins, a member of the Bar of this Court, do hereby certify that three (3) copies of the foregoing motion and answer were served upon each other party separately represented in this proceeding by depositing said copies in the United States mail, properly addressed, with airmail postage prepaid, pursuant to Rule 33 of the Rules of this Court, this 28th day of September, 1979.

_____

Daniel F. Collins

19

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 83, ORIGINAL

STATE OF MARYLAND, *et al.*,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

ON MOTIONS FOR LEAVE TO INTERVENE AND
TO APPEAL AS *AMICUS CURIAE*

REPORT OF SPECIAL MASTER

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Special Master

May 14, 1980

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 83, ORIGINAL

STATE OF MARYLAND, *et al.*,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

ON MOTIONS FOR LEAVE TO INTERVENE AND TO APPEAR AS *AMICUS CURIAE*

REPORT OF SPECIAL MASTER

By order of the Court dated March 3, 1980, the undersigned was appointed Special Master in the above entitled case. By the same order motions of Columbia Gas Transmission Corporation and sixteen other pipelines, and of the State of New Jersey for leave to intervene were referred to the Special Master.

Thereafter, on April 2, 1980, the United States and the Federal Energy Regulatory Commission filed a motion for leave to intervene. Although no specific order of reference of this motion has been made to the Special Master, he assumes for the purpose of this report that he

is authorized to advise the Court as to the disposition of the motion pursuant to the provision in the order of March 3, 1980, that "the Special Master is directed to submit such reports as he may deem appropriate." The Special Master finds that a report on the motion of the United States and the Federal Energy Regulatory Commission to intervene is appropriate in order to permit the proceedings to be carried forward without further delay.

The order of March 3, 1980, also referred to the Special Master a motion of Associated Gas Distributors for leave to file a brief *amicus curiae* in support of the plaintiff's motion for judgment on the pleadings.

This report deals with the above motions. No report is now made on the motion for judgment on the pleadings since the Special Master finds such a report at the present time would be premature pending further presentations to the Special Master by the parties on the need to hold evidentiary hearings in the case.

FACTS

So far as is necessary for the disposition of these motions, this action was initiated by a motion for leave to file a bill of complaint in an original action made on March 29, 1979, by the states of Maryland, Illinois, Indiana, Massachusetts, Michigan, New York, Rhode Island and Wisconsin. The attached complaint alleged the unconstitutionality of a Louisiana statute, designated as R.S. 47:1301-1307, imposing a "first use tax" on natural gas produced from the Outer Continental Shelf and federal enclaves, and other imported gas moving into Louisiana. The Louisiana statute is alleged to violate the commerce clause of the United States Constitution as well as the supremacy clause, the import-

export clause and equal protection of the law. Over the opposition of Louisiana the Court on June 18, 1979, granted the motion for leave to file the complaint. On August 17, 1979, Louisiana filed an answer to the complaint addressing each paragraph of the complaint and asserting the legality and constitutionality of the statutes attacked and further asserting that many factual controversies were raised by the pleadings necessitating evidentiary hearings. The plaintiffs have filed a motion for judgment on the pleadings and Louisiana has filed a motion to dismiss the complaint. These motions are still pending, but, in the view of the Special Master, are not ripe for determination pending further presentations by the parties.

On September 24, 1979, Columbia Gas Transmission Corp. and sixteen other pipeline companies filed motions to intervene as parties plaintiff and to file complaints which alleged that the first use tax makes them liable for the payment of the tax and deprives them of protections afforded by the Constitution. On September 24, 1979, Louisiana filed an opposition to this motion.

On October 22, 1979, the State of New Jersey filed a motion for leave to intervene as a party plaintiff alleging facts comparable to those alleged by the complaining states and asserting the same claims as to the unconstitutionality of the Louisiana statutes. On December 3, 1979, Louisiana filed an opposition to this motion.

On April 2, 1980, the United States and the Federal Energy Regulatory Commission filed a motion for leave to intervene and file an intervention complaint alleging their interests as the federal agency responsible for natural gas regulation, as the lessor of gas producing property on the outer continental shelf, and as a consumer of natural gas subjected to the tax. The com-

plaint alleges the unconstitutionality of the Louisiana stautes both under the commerce clause and the supremacy clause. At the date this report was prepared, no response to this motion had been filed by Louisiana.

On October 24, 1979, Associated Gas Distributors filed a motion for leave to file a brief *amicus curiae* in support of the plaintiffs' motion for judgment on the pleadings. Although some of the parties withheld consent to filing this brief, making the motion for leave to file necessary, no formal opposition has been filed.

RECOMMENDATIONS

I.

NEW JERSEY'S MOTION FOR LEAVE TO FILE AN INTERVENING COMPLAINT.

It is not contested that the complaint which New Jersey moves to file is virtually indistinguishable from the complaint of the State of Maryland and its co-plaintiffs. New Jersey merely adds the facts applicable to it and its citizens. Under these circumstances it would seem clear that, had New Jersey opted to file a wholly independent original action, the Court in order to act consistently with its action in the Maryland case, would have granted the motion. Filing as an intervenor has the advantage of promoting judicial economy and placing New Jersey on an equal footing with the eight states in the original suit. No claim has been made that permitting intervention will unduely delay or prejudice the adjudication of the rights of the original parties. Granting the motion appears to be consistent with past Supreme Court practice, *Pennsylvania v. Connecticut,* 401 U.S. 931, and with the standard provided by Rule 24(b) of the Federal Rules of Civil Procedure, which by Rule 9 of this Court's Rules may

be taken as a guide to procedure in original actions in this Court where their application is appropriate. The applicant's claim and that in the main action have common questions of fact and law.

The Special Master recommends that the motion of New Jersey to intervene and file its complaint be granted.

II.

MOTION OF THE UNITED STATES AND FEDERAL REGULATORY COMMISSION TO INTERVENE AND FILE A COMPLAINT IN INTERVENTION.

The interest in the dispute of the United States and the Commission is somewhat different from that of the original plaintiffs. However, from the point of view of completing the litigation with the participation of all parties which have a direct and important interest in it, it is not only appropriate, but highly desirable that the United States be joined as a party. *Cf. Texas v. Louisiana,* 410 U.S. 702, 712-14. Apart from its interest as a consumer of natural gas, the United States has a separate interest because of its responsibilities under the Outer Continental Shelf Act, 43 U.S.C. 1331-43. The Federal Energy Regulatory Commission is involved as the administrative agency responsible for the execution of the Natural Gas Act, 15 U.S.C. 717-717w and the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3351. Rule 24(b) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 9 of the rules of this Court, provides:

> When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental

> officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action.

In this case the plaintiffs do in fact rely upon actions of the United States and the Federal Energy Regulatory Commission under both the Outer Continental Shelf Act and the Natural Gas Acts for their claims as to the unconstitutionality of the first use tax.

In the past the Court has permitted the United States to intervene under comparable circumstances in original cases involving disputes between two or more states. *Wisconsin v. Illinois,* 278 U.S. 362; *Arizona v. California,* 344 U.S. 919; *Oklahoma v. Texas,* 253 U.S. 465; *New Jersey v. New York,* 345 U.S. 369, 373.

The Special Master recommends that the motion of the United States and the Federal Energy Regulatory Commission to intervene as plaintiffs be granted.

III.

MOTION OF COLUMBIA GAS TRANSMISSION CORPORATION AND SIXTEEN OTHER PIPELINES TO INTERVENE AS PLAINTIFFS.

The interests of the pipelines in the outcome of this suit is direct and material. The first use tax falls directly on the pipelines who own and control the gas at the time the tax is imposed and who are directly liable for its payment. It is asserted that the amount involved annually is $250,000,000. The pipelines would therefore be the taxpayers presumably entitled to recover taxes already paid if the act were declared unconstitutional and repayment ordered. Moreover, since the pipelines have been permitted to pass the cost of the tax along to the

purchasers of the gas, it has a direct effect on the price of the gas to the ultimate consumer and therefore its competitive position with respect to competing fuels.

While the interests of the pipelines differ from those of the states and the United States, their claims of unconstitutionality raise the same issues and require the same proof as the others. Therefore, to permit the pipelines to participate as parties should not complicate the trial of the case, delay it, or prejudice the rights of the original parties.

Louisiana, which opposes the intervention, argues that the pipelines are not proper parties to an original action since they could not have commenced it in the first place. However, the Court has permitted the intervention of non-states in original actions once the Court has taken jurisdiction of a case. *Oklahoma v. Texas,* 258 U.S. 574; *Texas v. Louisiana,* 416 U.S. 965. Very clearly the Court has held that the Constitutional limitations on original actions before it does not prevent intervention by private parties once the Court has been given jurisdiction of the case.

Louisiana asserts that the Eleventh Amendment, denying jurisdiction in the federal courts over suits against a state by a citizen of another state, prevents the intervention of the pipelines, which are citizens of various states other than Louisiana. Without specifically addressing the issue of the impact of the Eleventh Amendment, this Court has permitted the intervention of private parties in opposition to states which were parties to original actions. *Oklahoma v. Texas,* 258 U.S. 574; *Texas v. Louisiana,* 416 U.S. 965. The question as to the applicability of the Eleventh Amendment was left open in *New Jersey v. New York,* 345 U.S. 369, 372. And in *Utah v. United States,* 394 U.S. 89, where a Special

Master had found that the state had not waived its sovereign immunity, the court agreed to the denial of intervention, but not on the ground that was suggested by the Special Master. The Court found that the issues in the case had been narrowed by stipulation and suggested that absent that stipulation "Morton's right to intervene would have had a substantial basis. . . . it would have been fairest to permit Morton to speak for itself." 394 U.S. at 92.

Intervention appears to me materially different from an original suit against a state by a citizen of another state. Here Louisiana is already a party to a proceeding in which the validity of its tax is under attack. If it loses the suit, it would presumably be liable to repay the taxes already collected and intervention of the pipelines would not constitute an additional claim against the assets of the state. Nor would it affect the future imposition of the tax, which would be forbidden or permitted depending on the outcome of the suit by Maryland and its sister states. The difference would be that of permitting the pipelines to assert their claim directly rather than relying on the states, of which they are not even citizens, to assert their claims for them. To relegate the pipelines to their remedy in the Louisiana courts would result in duplicative litigation with the possibility of conflicting results.[1]

The Special Master recommends that for the purpose of expeditiously carrying forward these proceedings the

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[1]The pipelines assert a waiver of immunity by a Louisiana statute permitting a suit at law in state or federal courts to recover the tax if paid under protest. La. R.S. 47:1576. Louisiana responds that the consent to be sued does not cover the type of action here involved. The Special Master makes no recommendation on the resolution of this dispute since he believes the grant of the motion is appropriate apart from any waiver of immunity.

pipelines be permitted to intervene, reserving the final determination of the applicability of the Eleventh Amendment until the final decision of the case.

IV.

MOTION OF ASSOCIATED GAS DISTRIBUTORS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS.

The interest of the Association in this proceeding arises from the fact that it is an association of gas distributors serving eleven million customers along the eastern seaboard. It asserts that more than half of the gas sold by its members comes from the Outer Continental Shelf and has moved through Louisiana, thus being subjected to that state's first use tax. The cost of the tax has been passed on to them and by them to their customers. In the brief *amicus curiae* attached to the motion it is argued that the tax is unconstitutional under both the supremacy clause and the commerce clause.

While the argument of the Association differs in minor detail from that of the pipelines, the pipelines are not now parties and the views of the distributors may be helpful in the disposition of the case.

The Special Master recommends that the motion of Associated Gas Distributors for leave to file a brief *amicus curiae* supporting the plaintiffs' motion for judgment on the pleadings be granted.

Respectfully submitted,

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Special Master

May 14, 1980

Number 83, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

versus

STATE OF LOUISIANA,

Defendant

EXCEPTIONS OF THE STATE OF LOUISIANA TO THE REPORT OF SPECIAL MASTER, DATED MAY 14, 1980 AND BRIEF IN SUPPORT THEREOF

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Number 83, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

versus

STATE OF LOUISIANA,

Defendant

EXCEPTIONS OF THE STATE OF LOUISIANA TO THE REPORT OF SPECIAL MASTER, DATED MAY 14, 1980

The State of Louisiana, the defendant herein, excepts to the Special Master's Report, dated May 14, 1980, in the following respects:

Exception No. 1

The State of Louisiana excepts to the Special Master's premature consideration of the intervention motions of (a) the State of New Jersey, (b) the United States and the Federal Energy Regulatory Commission, and (c) the seventeen pipeline companies, without first addressing the jurisdictional, standing and prudential problems raised by the State of Louisiana in its answer and motion to dismiss.

Exception No. 2

The State of Louisiana excepts to the Special Master's recommendation that the motion of the State of New Jersey for leave to file a complaint as intervenor be granted.

Exception No. 3

The State of Louisiana excepts to the Special Master's recommendation that the motion of the United States and the Federal Energy Regulatory Commission to intervene and file a complaint in intervention be granted.

Exception No. 4

The State of Louisiana excepts to the Special Master's recommendation that the seventeen pipeline companies be permitted to intervene as plaintiffs.

Exception No. 5

The State of Louisiana excepts to the Special Master's reservation of "the final determination of the applicability of the Eleventh Amendment until the final decision of the case."

Exception No. 6

The State of Louisiana excepts to all the Special Master's findings of fact and conclusions of law with respect to the foregoing five exceptions.

Exception No. 7

The State of Louisiana excepts to the Special Master's recommendation that the motion of Associated Gas Distributors in support of plaintiffs' motion for judgment on the pleadings be granted.

Respectfully submitted in pursuance of the Order of the Court dated June 9, 1980.

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STATE OF WISCONSIN,

Plaintiffs

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STATE OF LOUISIANA,

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BRIEF IN SUPPORT OF THE EXCEPTIONS OF THE STATE OF LOUISIANA TO THE REPORT OF SPECIAL MASTER

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IN THE

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STATE OF MARYLAND,
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STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

versus

STATE OF LOUISIANA,

Defendant

BRIEF IN SUPPORT OF THE EXCEPTIONS OF THE STATE OF LOUISIANA TO THE REPORT OF SPECIAL MASTER

STATEMENT OF THE CASE

On March 29, 1979, the eight Plaintiff States moved for leave to file a complaint against the State of Louisiana. The proposed complaint sought (1) a declaration that the Louisiana First Use Tax "is unconstitutional and unenforceable with respect to natural gas transported or sold in interstate or foreign commerce;" (2) preliminary and permanent injunctions prohibiting Louisiana from collecting that tax; and (3) an order "that any and all revenues collected pursuant to the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce be refunded to the taxpayers together with interest thereon."

Paragraph I of the proposed complaint asserted that

> The exclusive original jurisdiction of this Court is invoked under the Constitution of the United States, article III, section 2, clauses 1 and 2 ("Controversies between two or more States"), and 28 U.S.C. §1251 (a) (1) (1976). Plaintiffs have no other plain, speedy or adequate remedy at law and have no remedy whatsoever in any other federal court.

In Paragraph III of the complaint it was further alleged that

> Plaintiffs bring this action in their proprietary capacities as substantial purchasers of natural gas upon which the [Louisiana] First Use Tax will be imposed, and in those capacities will sustain substantial monetary damages as a result of the First Use Tax. Plaintiffs also bring this action in their *parens patriae*, or quasi-sovereign capacities, as guardians of the health, welfare and prosperity of the citizens of Maryland, Illinois, Indiana, Massachusetts, Michigan, New York, Rhode Island, and Wisconsin.

Louisiana responded to the motion for leave to file by a brief in opposition that challenged not only the substantiality of the federal constitutional issues respecting the First Use Tax but also the standings of the Plaintiff States to raise those issues. Standing was questioned from the standpoint of the Plaintiffs' alleged proprietary capacities as gas consumers and their alleged *parens patriae* representation of their citizens. Louisiana further urged that maintenance of this action was precluded by the prudential

absention doctrine reflected in *Arizona v. New Mexico*, 425 U.S. 794 (1976).

Thereafter the United States and the Federal Energy Regulatory Commission, as *amici curiae*, filed a brief asserting that the Plaintiff States did have standing and that the case was otherwise appropriate for the exercise of original jurisdiction. The *Arizona* case was distinguished *inter alia* because in the instant situation there was — at the time the *amici* brief was filed — no pending suit in any other court that was thought to be "an appropriate vehicle" for the decision of the constitutional issues raised by the Plaintiff States.[1]

On June 18, 1979, this Court entered an order that simply granted the motion for leave to file the bill of complaint and gave the State of Louisiana sixty days to answer. No mention was made of the objections raised by Louisiana. Nor was there any finding or determination that the Plaintiff States had standing to raise their constitutional objections to the First Use Tax or that this Court's original jurisdiction had been properly invoked.

On August 17, 1979, Louisiana filed an answer to the complaint. The answer addressed each paragraph of the complaint, specifically denying the allegations of jurisdiction in Paragraph I of the complaint and the allegations of standing in Paragraph III "either in their proprietary capacity or as *parens patriae* on behalf of their respective citizens." Paragraph LXVII of the answer recited the additional allegation that "plaintiff states are without standing to institute and prosecute this action, and this Court has no original jurisdiction of this cause, all for the reasons set forth in Louisiana's brief in opposition to Plaintiffs' motion for leave to file complaint herein."

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[1]In the *Arizona* case, 425 U.S. at 796, it appeared that a declaratory judgment action had been filed by three Arizona utilities in a New Mexico state court prior to Arizona's filing of its motion in this Court to file a bill of complaint. That state court action raised the same constitutional issues that Arizona sought to raise in this Court.

This paragraph of the answer also asserted that the Plaintiff States "have other judicial remedies available to them by way of intervention in pending legal proceedings in the courts of Louisiana through which the issues sought to be raised here may be fully litigated and, if necessary, ultimately brought to this Court by direct appeal."

The "pending legal proceedings in the courts of Louisiana" referred to in Paragraph LXVII of the answer related to the filing in a Louisiana state court on June 22, 1979—just four days after this Court granted leave to file the Plaintiff States' complaint — of a tax refund suit by the seventeen private pipeline companies. That suit alleged that the Louisiana First Use Tax was unconstitutional for precisely the same reasons that are asserted before this Court by the Plaintiff States. *Southern Natural Gas Co., et al, v. McNamara, Louisiana Department of Revenue and Taxation and the State of Louisiana,* Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana, Number 225,533.[2] Louisiana's answer was accompanied by a motion for the appointment of a Special Master.

On August 28, 1979, the seventeen pipeline companies upon whom Louisiana's First Used Tax is levied filed a motion for leave to intervene as plaintiffs in this Court and to file a complaint. The proposed complaint, attached to the motion, asserted in its first paragraph that leave was being sought "to file this Complaint in Intervention pursuant to article III, §2, clauses 1 and 2 of the Constitution of the United States ('Controversies ... between a State and Citizens of another State'); Rule 9 of this Court; and Rule 24 of the Federal Rules of Civil Procedure." Paragraph 10 of the proposed complaint stated that each intervenor had timely instituted suit in the Louisiana state court (the aforementioned case No. 225,533) to recover from the

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[2]The petition in that tax refund suit has been reproduced in full (pp. A-1 to A-11) in the Appendix to Louisiana's Brief in Response to Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae, filed in this Court on December 5, 1979.

State of Louisiana all First Use Taxes that had been paid each month under protest. The proposed complaint then proceeded to allege the identical constitutional defects in the First Use Tax statute that had been asserted by the Plaintiff States in their complaint on file in this Court and by the same seventeen pipeline companies in their tax refund petition on file in the Louisiana state court.

On September 18, 1979, the eight Plaintiff States filed a motion for judgment on the pleadings. That motion was later supported by the United States and the Federal Energy Regulatory Commission as *amici curiae*. The seventeen pipeline companies, whose motion to intervene and to file a complaint lay unacted upon by the Court, filed a separate motion for leave to file their own motion for judgment on the pleadings, with accompanying brief in support thereof.

In the meantime, on October 22, 1979, the State of Louisiana filed a motion to dismiss the complaint of the Plaintiff States, combined with a supporting brief and a brief in opposition to the pending motion of the Plaintiff States for judgment on the pleadings. This motion to dismiss renewed and expanded the jurisdictional and prudential objections that Louisiana had expressed in its earlier opposition to the motion for leave to file the complaint, objections which had been restated in Louisiana's answer to the complaint. Special emphasis was given to the newly-demonstrated availability of an alternative forum in the Louisiana state courts wherein the identical constitutional issues were being raised and pursued. This was said to put this case on all fours with the absention situation before this Court in the *Arizona v. New Mexico* litigation. Emphasis was also given the total absence of any real sovereign interest in the Plaintiff States, other than that of being gas consumers; it was becoming increasingly clear, said Louisiana, that the Plaintiff States were simply volunteering to pursue the tax refund claims of the private taxpayers, the seventeen pipeline companies.

In response to Louisiana's motion to dismiss, the Plaintiffs' brief in opposition asserted (p. 6) that this Court's June 18 order,

which had merely allowed the complaint to be filed, constituted an acknowledgment of the standing of the Plaintiff States to bring this original action, inasmuch as the Court had "acted in the face of Louisiana's brief in opposition" to the filing, "which urged that the plaintiff states lacked standing." This Court, said the Plaintiff States, "should not reverse its decision acknowledging the standing of the plaintiff states to bring this suit" (p. 6).

As to Louisiana's prudential objections in its answer and motion to dismiss, relative to the recently filed tax refund suit in the Louisiana state courts, the Plaintiff States' opposition brief (pp. 6-7) asserted that the Court's June 18 order reflected a considered rejection of Louisiana's claim in this respect. That order, reiterated the brief (p. 7), constituted "this Court's decision to exercise its original jurisdiction."

On October 22, 1979, the State of New Jersey filed a motion for leave to intervene as a party plaintiff, alleging in its proposed complaint facts and issues comparable to those in the complaint of the eight Plaintiff States. Louisiana duly filed an opposition to this motion.

Out of this welter of complaints, answers, motions, oppositions, and briefs, not all of which have been described herein, came this Court's order of March 3, 1980. That order granted Louisiana's motion to appoint a Special Master and appointed the Honorable John F. Davis as the Special Master. The Court thereby referred all pending matters to the Special Master.

The Special Master invited briefs and statements from all concerned respecting the efforts of the private pipeline companies and the State of New Jersey to intervene as parties plaintiff and to file separate complaints. After being urged to do so by the Special Master,[3] the United States and the Federal Energy

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[3]At the hearing held on March 21, 1980, the Special Master stated to Government counsel (Tr. 85) that if the time comes "when you feel you want to participate in this case, you are not going to be able to just tell me you want to participate in the case. We will have the delay of getting a report to get it to the *(Continued)*

Regulatory Commission abandoned their *amici* stance and filed their own motion for leave to intervene as plaintiffs and to file an attached Complaint in Intervention. This complaint sought to invoke the jurisdiction of this Court "under Section 1251 (b) (2) of Title 28 of the United States Code." Like the complaint of the Plaintiff States, this complaint in intervention requested a declaration of the constitutional invalidity of Louisiana's First Use Tax statute, as well as an order that all revenues collected pursuant to that statute "be refunded to the taxpayers together with interest thereon." The complaint, apparently unable to assert what relief the interests of the United States necessitated, merely requested that the Court "grant such relief as the Court may deem appropriate and necessary to protect the interests of the United States and the Federal Energy Regulatory Commission."

On May 14, 1980, the Special Master filed his interim report respecting motions for leave to intervene and to appear as *amici curiae*. The Special Master therein recommended that the State of New Jersey, the United States and the Federal Energy Regulatory Commission, and the seventeen pipeline taxpayers all be allowed to intervene as parties plaintiff. To each of these motions there was attached a complaint raising the same constitutional issues contained in the complaint of the Plaintiff States, as well as in the complaint of the seventeen pipeline companies in their tax refund suit in Louisiana.

Arguments were held on June 19, 1980, before the Special Master relative to Louisiana's motion to dismiss the complaint filed by the Plaintiff States, as well as the Plaintiff States' motion for judgment on the pleadings. The Special Master has promised a report and recommendations on those two motions by

(Continued)
Court and getting the Court to act on it. I can't grant you intervention in the case. All I can do is recommend to the Court ... You may be in trouble and we can't get you in just overnight."

To that statement, Government counsel responded: "I understand, and I think the United States will take steps to protect itself" (Tr. 85).

September of 1980. In addition, the Special Master requested and received a Proffer of Proof by the State of Louisiana as the facts that it considers to be in dispute and thus necessary to be proved should an evidentiary hearing be scheduled to determine the constitutional issues arising under the Commerce Clause, the Supremacy Clause, the Import-Export Clause, the Contract Clause and the Equal Protection Clause.

To recapitulate, the State of Louisiana is involved in at least eleven judicial proceedings. In each of these proceedings the same five constitutional objections as to the validity of the First Use Tax statute are at issue.

FEDERAL PROCEEDINGS

(1-4) Before this Court in the instant case, one complaint has been filed by the eight Plaintiff States. The Special Master has recommended that three sets of parties be allowed to intervene (New Jersey, the United States and Federal Energy Regulatory Commission, and seventeen pipeline companies). Proposed complaints are attached to the three intervention motions.

(5) A complaint was filed by the Federal Energy Regulatory Commission against Shirley McNamara, et al., in the Middle District of Louisiana, Civil Action 78-384. A motion to stay was granted. See opinion reproduced in the Appendix to the Motion to Dismiss and Brief in Support of Motion to Dismiss and in Opposition to Motion for Judgment on the Pleadings, filed by the defendant in this Court on October 22, 1979. The matter was appealed to the Fifth Circuit and there docketed as No. 79-1403. On the day of argument, the matter was stayed.

STATE PROCEEDINGS

(6) On September 22, 1978, Edwin W. Edwards, et al., filed a petition for declaratory relief, naming as defendants, among others, all of the pipelines doing business in Louisiana. All of these pipelines, except Mississippi River Transmission Corporation, filed a reconventional demand (cross-claim), asserting these constitutional grounds. The

pipeline companies removed the case to the federal court where a motion to remand was granted. (464 F. Supp. 654, USDC MD LA. 1979).

(7) A petition was filed on May 29, 1979, by Arkansas Louisiana Gas Company against Shirley McNamara, et al., under Docket Number 224,695, Division J, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana.

(8) The seventeen pipeline companies filed a petition, for refund of taxes paid under protest, against Shirley McNamara, et al., on the 22nd day of June, 1979, under Docket Number 225,533, Division D, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana. Pertinent parts of this petition may be found in the Appendix to the Brief of the State of Louisiana in Response to Brief of the United States and the Federal Energy Regulatory Commission as *Amici Curiae*, filed herein on December 5, 1979.

(9) A petition was filed by Pennzoil Oil & Gas, Inc. against Shirley McNamara, et al., on the 27th day of June, 1979, under Docket Number 225,649, Division D, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana.

(10) A petition was filed by Pogo Producing Company against Shirley McNamara, et al., on the 27th day of June, 1979, under Docket Number 225,650, Division H, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana.

(11) A petition was filed by Pennzoil Louisiana and Texas Offshore, Inc., against Shirley McNamara, et al., on the 27th day of June, 1979, under Docket Number 225,651, Division F, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana.

This plethora of challenges to the constitutionality of Louisiana's First Use Tax statute makes it unnecessary for this Court to devote its valuable time and energies to developing the constitutional issues in the first instance. There is no want of another suitable forum "where there is jurisdiction over the named parties, where the issues tendered may be litigated, and

where appropriate relief may be had." *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972).

Indeed, the most suitable forum of all is that of the state courts of Louisiana, where the taxpayers' refund suit is already pending. See No. 8 in the above list. That is the only forum that can provide an authoritative construction and interpretation of this new and complex state tax statute. That is the only forum that can provide on-the-spot development of constitutional facts. And that is the only forum that can provide the relief that the parties all seek, i.e., a refund of the taxes paid by the pipeline companies. See *Washington v. General Motors Corp.*, 406 U.S. 109, 114 (1972). As was said in *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939),

> To open this Court to actions by States to recover taxes claimed to be payable by citizens of other States, in the absence of facts showing the necessity for such intervention, would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it.

ARGUMENT

I.

THE INTERVENTION MOTIONS NEED NOT BE RESOLVED UNTIL THE JURISDICTION OF THE COURT OVER THE ORIGINAL ACTION HAS BEEN ESTABLISHED

Underlying all the intervention motions now before the Court is the fact that the putative intervenors seek to attach themselves to one of what Article III described as "controversies between two or more States." As Chief Justice Fuller said in *Louisiana v. Texas*, 176 U.S. 1, 15 (1900), "it is apparent that the jurisdiction

[over such controversies] is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable."

But there are serious and unresolved questions in this case whether there is an "absolute necessity" to exercise the original jurisdiction that the Plaintiff States seek to invoke. Moreover, there are serious and unresolved questions whether the Plaintiff States have alleged a "properly justiciable" controversy in their complaint before this Court. Those questions are posed by the State of Louisiana both in its answer to the complaint and in its motion to dismiss the action. That motion is presently pending before the Special Master, the parties have submitted both written and oral arguments, and the Special Master has indicated an intent to render a report thereon by September of 1980. But the point is that this Court's original jurisdiction to entertain the principal suit, to which the intervention motions are addressed, has not been resolved, established, or conceded.

Until the dark clouds over this attempt to invoke the Court's original jurisdiction have been dissipated, any action on a motion to intervene must be premature. If it ultimately be concluded that the original action filed by the Plaintiff States suffers from a terminal jurisdictional defect, or even a prudential disfavor, the interventions recommended by the Special Master become as "sound and fury, signifying nothing." For it is well established that intervention presupposes the pendency of an action within the Court's jurisdiction, into which the intervenor seeks to enter.[4] And it is also elementary that intervention cannot cure any jurisdiction if none existed before. *United States ex rel.*

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[4] "An existing suit within the court's jurisdiction is a prerequisite of an intervention, which is an ancillary proceeding in an already instituted suit or action by which a third person is permitted to make himself a party, either joining the plaintiff in claiming what is sought by the complaint, or uniting with the defendant in resisting the claims of the plaintiff, or demanding something adversely to both of them." *Kendrick v. Kendrick*, 16 F.2d 744, 745 (5th Cir. 1927), *cert. denied*, 273 U.S. 758. See also *Rocca v. Thompson*, 223 U.S. 317, 331 (1912); *Stewart v. Dunham*, 115 U.S. 61, 64 (1885).

Texas Portland Cement Co. v. McCord, 233 U.S. 157, 163-164 (1914); C. Wright and A. Miller, 7A Federal Practice and Procedure §1917, pp. 584-585 (1972).

Because the Special Master has seen fit to place the intervention cart before the jurisdictional horse, arguments in support of or in opposition to the recommended interventions must necessarily be speculative and incomplete to a distressing degree. These efforts to intervene can be fully assessed and resolved only after the Court's jurisdiction over the original action has been finally established. The State of Louisiana therefore suggests that this Court might deem it appropriate to defer consideration of these exceptions to the Special Master's report on the intervention motions until the Special Master has submitted his report on Louisiana's motion to dismiss. That motion brings into focus all the jurisdictional, standing and prudential problems that seemingly plague the complaint filed by the Plaintiff States. Indeed, this Court's action on the motion to dismiss, whatever be the Special Master's recommendation with respect thereto, may well be dispositive of the entire case. Thus if the Court becomes convinced that the Plaintiffs' complaint, for any of a number of reasons, cannot or need not be pursued, then the intervention motions become moot and ineligible for resolution.

One further comment is necessary at this point. The Plaintiff States and some of the putative intervenors have consistently argued, without citation of authority, that this Court's order of June 18, 1979, granting leave to file the complaint and inviting an answer thereto, constitutes a final adjudication that the Court's original jurisdiction has been properly invoked. This argument is drawn from the fact that Louisiana's opposition to the motion for leave to file advanced some jurisdictional and prudential objections to the filing.

But the argument is constructed of sand. To begin with, this Court's exercise of its original jurisdiction powers is not so highly structured or stylized that the grant of leave to file a complaint must always be deemed a rejection of any and all jurisdictional

objections to the filing. True, the Court does have discretion, in assessing a motion for leave to file, to consider jurisdictional objections, and has frequently done so. See, e.g., *Arizona v. New Mexico*, 425 U.S. 794 (1976); *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976); *Massachusetts v. Missouri*, 308 U.S. 1 (1939). And when jurisdictional objections are considered in connection with a motion for leave to file, the Court's treatment of the objections normally takes the form of a well-rounded opinion. *Ibid.* Seldom if ever does the Court reject non-frivolous jurisdictional objections, filed by a sovereign State, in an off-hand summary fashion.

But there are numerous instances where the Court has considered it the better part of discretion to allow the complaint to be filed despite jurisdictional protests and to reserve for a later time a consideration of those protests. See, e.g., *Louisiana v. Texas*, 176 U.S. 1, 2 (1900); *United States v. West Virginia*, 295 U.S. 463, 457 (1935); *Kansas v. United States*, 204 U.S. 331, 337 (1907). Obviously, not only the parties but the Court itself can raise, *sua sponte*, jurisdictional defects long after the filing of the complaint. In *California v. Southern Pacific Co.*, 157 U.S. 229 (1895), an original action was dismissed, persumably *sua sponte*, after both a bill of complaint and amendment thereto were filed by leave of Court, issue joined, a motion to intervene denied, the commissioner's report filed with the Court, and the matter argued on the merits. See also *Minnesota v. Northern Securities Co.*, 184 U.S. 199 (1902).

Such a deferred course of action might be deemed appropriate where the jurisdictional and prudential problems are viewed as too important and complex, or perhaps too entangled with public interests, to permit quick resolution at the pre-filing stage. Whatever the reason, however, the Court appears to have followed such an option in this case. In so doing, the Court gave not the slightest indication that it had considered, let alone rejected, the jurisdictional objections. Nor is there any basis for concluding that the Court's order of June 18 was entered "with prejudice" to Louisiana's procedural right to renew such objec-

tions in the answer that the Court requested, or in the subsequently filed motion to dismiss.

To hold that such a routine filing order, entered in the exercise of judicial discretion, is a jurisdictional precedent is to denigrate the jealous regard this Court has shown for a carefully limited exercise of its original jurisdiction. It is inconceivable that such an order means, among other things, that (1) the Plaintiff States have a justiciable case or controversy with the State of Louisiana with respect to a tax levied on private pipeline companies in Louisiana, (2) the Plaintiff States have standing to act as volunteers in assisting the private pipeline companies in their effort to secure tax refunds, and (3) the Plaintiff States, by representing the interests and claims of the private pipeline companies, can invoke this Court's original jurisdiction in total disregard of the Eleventh Amendment jurisprudence. It is impossible, in short, to extract such monumentally significant jurisdictional rulings out of the peremptory order of June 18, 1979.

Where cases on the appellate docket have been fully reviewed without mention of any jurisdictional problems in the written opinions, the Court has consistently noted that such plenary review "is no basis for considering it as authoritative on the jurisdictional issue, it being the firm policy of this Court not to recognize the exercise of jurisdiction as precedent where the [jurisdictional] issue was ignored." *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 137 n. 2 (1947), and cases cited. See also *Hagans v. Lavine*, 415 U.S. 528, 533 n. 5 (1974), and cases cited ("when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us").

It would be passing strange were the order of June 18 to be construed as one that turned this Court's back on the historic right of litigants to raise basic jurisdictional objections at any stage of a proceeding. This Court does not lightly assume exercise of its original jurisdiction; nor does it lightly dismiss the grave type of jurisdictional objections that Louisiana has raised.

Like the order in *State of Idaho ex rel. Andrus v. Oregon*, 429 U.S. 163, 164 (1976), the June 18 order in the instant case "is not a judgment that the bill of complaint, to the extent that permission to file is granted, states a claim upon which relief may be granted." Nor is it a judgment that the Plaintiff States have standing to invoke the original jurisdiction of the Court under the circumstances here evident.

The conclusion follows that the jurisdictional, standing and prudential problems raised by Louisiana's answer and motion to dismiss have not been addressed or resolved by this Court. They remain open for argument and adjudication. And because they remain so totally unresolved, it cannot be said as yet that there has been any final determination that the original action, into which the putative intervenors seek to fit themselves, is properly or jurisdictionally before this Court.

II.
NEW JERSEY'S MOTION TO FILE AN INTERVENING COMPLAINT RAISES SERIOUS JURISDICTIONAL PROBLEMS

The Special Master has recommended that the State of New Jersey be allowed to intervene in order to file a complaint that is "virtually indistinguishable" from the complaint filed by the eight Plaintiff States. Had New Jersey opted to file a wholly independent original action, said the Special Master, this Court would have granted the motion for leave to file "in order to act consistently with its action in the Maryland case" (Report, p. A-5).

The major difficulty with this recommendation is its prematurity. Were it clear that this Court is satisfied that the Maryland complaint meets all Article III requirements as to jurisdiction and "case or controversy," there could be no quarrel with the recommendation as to New Jersey. But that is not the case. As we have seen, the June 18, 1979 order allowing the Plaintiff States to file a complaint cannot be read as a ruling rejecting all jurisdictional, standing and prudential objections.

Those objections, embodied in Louisiana's answer and motion to dismiss, have yet to be resolved. And until they are resolved, it is sheer speculation to say that this Court would have granted leave to New Jersey to file an identical complaint simply to be consistent with the June 18 order.

This is but an example of the uncertainties that attend a premature grant of intervention. This Court has repeatedly warned that "our original jurisdictions should be involved sparingly." *Utah v. United States*, 394 U.S. 89, 95 (1969); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972). And long ago the Court established that "the mere fact that a State is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another State or her citizens." *Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265, 287 (1888). These sentiments certainly do not constitute an open invitation to all States to intervene, in the name of consistency, in any case on the original docket in which other States are the plaintiffs. The notion of consistency, with all its hobgoblin characteristics, is not an excuse for allowing another State to intervene and to file another "virtually indistinguishable" complaint before the Article III validity of the principal complaint has been established. The addition of New Jersey as an intervening plaintiff at this point in the proceeding does nothing to advance the resolution of the Article III problems or the adjudication of the rights of the original parties. Until the Article III legitimacy of the parent suit has been established, it is premature to add to this Court's workload what is at best another highly questionable complaint. Certainly there is no precedent for such a premature intervention.[5]

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[5]The Special Master states that granting New Jersey's motion "appears to be consistent with past Supreme Court practice, *Pennsylvania v. Connecticut*, 401 U.S. 931, ..." (Report, p. A-5). Obviously he has reference to the case known as *Pennsylvania v. New York*, 407 U.S. 206 (1972), in which Connecticut had earlier been allowed to intervene as a party plaintiff, 400 U.S. 811. Footnote 2 of the Court's opinion, 407 U.S. at 207, summarizes the various interventions that were allowed in that case.

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The Special Master has also suggested that New Jersey's intervention at this early stage "has the advantage of promoting judicial economy and placing New Jersey on an equal footing with the eight states in the original suit." (Report, p. A-5). What elements of judicial economy are advanced by forcing this Court to address the Article III problems of nine rather than eight States is difficult to see. But the "equal footing" that such intervention purports to achieve does little more than expose the fragile and dubious nature of the "footing" of the complaint filed by the eight Plaintiff States. Since New Jersey's proposed complaint is "virtually indistinguishable" from the complaint already on file, it shares all the Article III defects that mark the "footing" of the main complaint.

While it is premature to assess and resolve the Article III problems in the context of a report on intervention motions, it is relevant to note the presence of a multitude of Article III problems on the face of New Jersey's proposed complaint. The fact that such problems are so readily apparent serves as a warning against New Jersey's premature entry into the case. It will be time enough to permit such intervention when and if this Court's original jurisdiction over this constitutional tax dispute has been considered and affirmed.

The weaknesses revealed in the "footing" of New Jersey's proposed complaint may be summarized as follows:

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But the various intervenors allowed in *Pennsylvania v. New York* afford no precedent for allowing New Jersey to intervene in this case. Interventions were allowed in *Pennsylvania* in the context of a situation where the Court much earlier had confirmed the existence of the Court's original and exclusive jurisdiction over the matter in litigation. *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71, 79 (1961). In the instant case, however, such jurisdiction has not been established.

Moreover, the *Pennsylvania* litigation involved competing claims by various States to escheat, or take custody of, unclaimed funds paid to Western Union Telegraph Co. for the purchase of money orders. The intervenors simply filed their respective claims to those funds in the form of complaints, alleging *in rem* causes of action. But the instant complaints against Louisiana are strictly *in personam* in nature, involving no claims by the Plaintiff States to money or property held by Louisiana.

(1) New Jersey's complaint is devoted exclusively to the claim that Louisiana's First Use Tax statute is unconstitutional in several respects, including alleged invalidity under the Commerce Clause and the Supremacy Clause. It is common knowledge, however, that these very same constitutional issues are at stake in various other judicial forums; in particular, those issues are being raised by the pipeline taxpayers in their tax refund suit in the Louisiana courts, a remedy that this Court has found fully adequate to warrant federal court absention. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 296-297 (1943).

Thus this Court's decision in *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976), becomes fully applicable. In that original proceeding, like this one, "the pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated." To borrow some words from the Special Master (Report, p. A-5), this Court "in order to act consistently with its action in the [Arizona] case" should abstain from processing this original proceeding and allow the constitutional issues to be adjudicated in the pending tax refund suits in Louisiana.

(2) The constitutional issues raised by New Jersey's complaint necessarily depend upon a reading of the Louisiana First Use Tax statute, which the Louisiana courts have yet to interpret. This brings into focus the abstention concepts generated by *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). *Pullman* counsels abstention whenever a federal court is otherwise forced to interpret state law without the benefit of state court consideration and therefore under circumstances where a constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time. In the circumstances here present, therefore, this Court's decision on the constitutional issues raised in New Jersey's complaint may well be advisory, and the underlying litigation rendered meaningless.

(3) Among the prayers for relief in the New Jersey complaint are requests for preliminary and permanent injunctions prohibiting Louisiana and its agents and employees from collecting the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce. Such requests immediately raise substantial questions as to the impact of the Tax Injunction Act of 1937, 28 U.S.C. §1341, on the exercise of this Court's original jurisdiction. by its terms, that Act provides that federal districts "shall not enjoin ... the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

But as this Court observed in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943), this statute reflects a much broader prudential concern that the federal judiciary not use its injunctive or equity powers to interfere with a State's internal economy and its administration of state tax statutes in particular. And since there is here present a "plain, speedy and efficient remedy" by way of a tax refund suit in the Louisiana state courts (which is precisely the same Louisiana remedy found adequate in *Huffman)*, this Court may well wish to abstain from enjoining the collection of Louisiana's First Use Tax in the spirit if not the word of the Tax Injunction Act.

(4) New Jersey's broad facial attack on Louisiana's First Use Tax statute poses still another threat to our federal system of government in the form of "needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes." *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 471 (1945). What was said in this regard recently in *Moore v. Sims*, 442 U.S. 415, 60 L.Ed.2d 994, 1007 (1979), applies to New Jersey's effort to use this Court as the original vehicle for assaulting a new and complex statute of a sister state:

> State courts are the principal expositors of state law. Almost every constitutional challenge - and particularly one as far ranging as that involved in this case - offers the op-

> portunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests. When federal courts disrupt that process of mediation while interjecting themselves in such disputes, they prevent the informed evolution of state policy by state tribunals. *Trainor v. Hernandez*, 431 U.S. 434, 445, 52 L.Ed.2d 486, 97. S. Ct. 1911 (1977). The price exacted in terms of comity would only be outweighed if state courts were not competent to adjudicate federal constitutional claims - a postulate we have repeatedly and emphatically rejected.

As was further said in *Moore v. Sims*, 60 L.Ed.2d at 1007, with respect to all facets of abstention, "the only pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims." That "adequate opportunity" is demonstrably present in the form of the Louisiana tax refund procedure. All of which leads back to *Arizona v. New Mexico*, 425 U.S. at 797, where the Court declined to grant leave to file Arizona's bill of complaint, functionally indistinguishable from New Jersey's complaint, inasmuch as New Mexico, like Louisiana, provided an appropriate state court forum "in which the *issues* tendered here may be litigated."

(5) New Jersey's proposed complaint is an unabashed effort to secure from this Court a declaratory judgment that the Louisiana First Use Tax statute is unconstitutional and unenforceable on its face. New Jersey seeks such a declaration without awaiting any interpretation or construction of the statute by the Louisiana courts in the pending tax refund suits. Such an effort is totally misplaced.

This Court's jurisprudence has long frowned on attempts to initiate interpretation of state statutes in federal courts, at least where no emergency exists. In *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1944), the Court noted that "as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of con-

stitutionality on the basis of preliminary guesses regarding local law." Yet New Jersey would have this Court guess as to which aspects or interpretations of the First Use Tax statute might create problems under the Commerce Clause, the Supremacy Clause, the Import-Export Clause, the Contract Clause, and the Equal Protection Clause. And this Court is expected to perform this gargantuan task under the rubric of reading the face of the statute.

All the parties plaintiff in this case, supported by the United States, New Jersey and the pipeline taxpayers, have sought a summary judgment of the unconstitutionality of this statute on the basis of the pleadings alone. Every effort by Louisiana to suggest that there may exist some critical factual disputes or statutory ambiguities has been rebuffed by those parties. The Special Master still has that motion for judgment on the pleadings under advisement. But it is not too late, in assessing the propriety of adding New Jersey's complaint to that of the eight Plaintiff States,[6] to recall the words of the Court in *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 229 (1957). While the context of that case was different from the instant one, the language with reference to interpreting another Louisiana statute could not be more pertinent:

> The Supreme Court of Louisiana has never considered the specific issue or even discussed generally the rationale of the statute, especially with reference to problems of constitutionality the District Court recognized the importance of the statute in deciding this case; it also recognized that a problem of interpretation was involved, that the statute cannot be read by him who runs. What are the situations to which the statute is applicable? Is the statute merely declaratory of prior Louisiana law? What are the problems that it was designed to meet? The answers to those questions are, or may be, relevant. Before attempting to answer them and to decide their relation to the issues in the case,

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[6]If the Court approves the Special Master's recommendation that New Jersey be allowed to intervene and file its complaint, the State of Louisiana assumes that it will be given time in which to answer.

> we think it advisable to have an interpretation, if possible, of the state statute by the only court that can interpret the statute with finality, the Louisiana Supreme Court .... It need hardly be added that the state courts in such a [Louisiana declaratory judgment] proceeding can decide definitively only questions of state law that are not subject to overriding federal law.

(6) New Jersey's proposed complaint makes plain that this is not a controversy between New Jersey and Louisiana and thus does not fall within this Court's original jurisdiction. Article III, Section 2, clauses 1 and 2; 28 U.S.C. §1251(a) (1).

It has long been the rule that in order to engage this Court's original jurisdiction, a plaintiff State like New Jersey must first demonstrate that the injury for which it seeks redress was directly caused by the actions of another State, Louisiana in this instance. *Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976); *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939). But the New Jersey complaint is devoid of any allegation that Louisiana has imposed or levied its First Use Tax on the State of New Jersey or on any of its citizens. The complaint simply alleges (Par. XIII) that the Federal Energy Regulatory Commission "has adopted procedures which ... permit the pipelines required to pay the First Use Tax to collect the amount of such tax from their customers pursuant to an automatic tracking mechanism." The complaint then candidly admits (Par. XV) that it is the "interstate natural gas pipeline companies who are subject to the tax and who will collect such tax from plaintiff state [New Jersey] and its citizens."

The interposition of the pipeline taxpayers and the Commission erases any direct casual nexus between New Jersey and Louisiana. Whatever injury New Jersey or its gas consuming inhabitants have suffered is due not to the imposition of the First Use Tax but to the voluntary acts of the pipeline taxpayers in seeking and obtaining approval from the Federal Energy Regulatory Commission to pass the tax on to the consumers of natural gas.

In short, New Jersey has failed to allege any kind of injury inflicted by Louisiana that gives rise to any "common-law rights of action." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 259 (1972). New Jersey's only complaint is that the price of natural gas, consumed by the State and many of its citizens, contains a "hidden" tax that the interstate transporter has succeeded in passing on to the consumers. There is no precedent for such a consumer-type cause of action. Cf. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). And were one to be recognized in the context of the original jurisdiction exercisable by this Court, a veritable avalanche of interstate suits might ensue. Each State would then be free to protest in this Court every tax levied by another State on products sold or consumed in the former, thus furthering the "balkanization" evil.

(7) Closely aligned with the fact that New Jersey has alleged no injury directly caused by Louisiana is the fact that New Jersey has asserted no injury to its sovereign interests.

It is settled doctrine that "a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated." *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976). It is equally clear that a State has standing to sue only when it is the real party in interest. See *Kansas v. United States*, 204 U.S. 331 (1907); *Oklahoma v. Atchison, T.&S.F.R. Co.*, 220 U.S. 277 (1911).

What sovereign or quasi-sovereign interest of New Jersey is at stake in this instance? New Jersey seems to complain only that the gas that it purchases to heat or cool its state-owned buildings, as well as the gas consumed by more than 1,800,000 New Jersey residents (Par. XVIII), will be impacted by the fact that the "interstate natural gas pipeline companies who are subject to the tax" are determined to pass on the "resulting economic burdens and hardships" (Par. XV) of the First Use Tax to the consumers, public and private. But the ability of a State to purchase gas or any other commodity free of any "hidden" or "passed-on" taxes is hardly the hallmark of a sovereign or quasi-sovereign concern. If New Jersey has any complaint at all, either directly

or as *parens patriae*, it should be directed at the pipeline taxpayers or the federal authorities who have permitted the burdens of the Louisiana tax to be passed on to the consumers.

Moreover, New Jersey can acquire no standing, *parens patriae*, or otherwise, to vindicate any of the constitutional provisions mentioned in the complaint. Particularly is that true as to the Commerce Clause, upon which the complaint places such heavy reliance in its first "cause of action" (Pars. XIX-XXXI). More than eighty years ago, when Louisiana protested the imposition by Texas of a quarantine on commerce from Louisiana thought to be infected with yellow fever, *Louisiana v. Texas*, 176 U.S. 1, 19 (1900), Louisiana was advised by this Court that

> Inasmuch as the vindication of the freedom of interstate commerce is not committed to the state of Louisiana, and that state is not engaged in such commerce, the cause of action must be regarded, not as involving any infringement of the powers of the state of Louisiana, or any special injury to her property, but as asserting that the state is entitled to seek relief in this way because the matters complained of affect her citizens at large.

That lesson is as applicable to New Jersey as it was to Louisiana.[7]

Nor can it be said that New Jersey has any sovereign interest in testing the constitutionality of another State's tax laws, whatever may be the indirect impact on New Jersey's economy. As the first Mr. Justice Harlan said in his concurring opinion in *Louisiana v. Texas*, 176 U.S. at 24,

> When the Constitution gave this court jurisdiction of controversies between states, it did not thereby authorize a state to bring another state to the bar of this court for the purpose of testing the constitutionality of local statutes or regulations that do not affect the property or the powers of

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[7]Compare *Pennsylvania v. West Virginia*, 262 U.S. 553, 591-592 (1923), where the two States were held to have standing to protest West Virginia legislation directing producers of natural gas to favor West Virginia consumers, thereby threatening to cut off gas supplies to the complaining States and their gas consuming citizens.

> the complaining state in its sovereign or corporate capacity, but which at most affect only the rights of individual citizens or corporations engaged in interstate commerce.

(8) The ultimate defect in New Jersey's proposed complaint is found by relating the admission in Par. X that the First Use Tax "will be required to be paid by interstate natural gas pipeline companies" with the prayer for relief lettered (d), where this Court is required to

> (d) Order that any and all revenues collected pursuant to the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce be refunded to the taxpayers together with interest thereon;

In other words, New Jersey proposes to invoke this Court's exclusive original jurisdiction over "Controversies between two or more States"[8] in order to secure a refund of taxes paid to the State of Louisiana by private pipeline taxpayers. Such an attempt is at war with the most fundamental concepts of this Court's original jurisdiction.

First, to invoke such original jurisdiction properly, the plaintiff State must bring an action on its own behalf and not on behalf of particular citizens. See, e.g., *New Hampshire v. Louisiana*, 108 U.S. 76 (1883); *Louisiana v. Texas*, 176 U.S. 1 (1900); *Oklahoma v. Atchison, T.&S.F.R. Co.*, 220 U.S. 277 (1911); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 n. 12 (1972); *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976). It is not enough, of course, that a State is the named plaintiff. *Florida v. Mellon*, 273 U.S. 12, 17 (1927). Nor is it enough that a State has acquired the legal title to a cause of action against the defendant State, where the recovery is sought for the benefit of another who is the real party in interest. *New Hampshire v.*

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[8]Paragraph I of the complaint seeks to invoke the Court's exclusive original jurisdiction over controversies between two or more States, as provided in Article III, Section 2, clauses 1 and 2 of the Constitution and 28 U.S.C. §1251 (a)(1).

Louisiana, supra, 91 ("one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens"). See also *Oklahoma et rel. Johnson v. Cook*, 304 U.S. 387, 392-394 (1938).

The underlying point of these decisions is that, in determining the scope of the Court's original jurisdiction over controversies between States, the Court must look to the asserted cause of action, the nature of the plaintiff State's interest, and the beneficiary of the remedy sought. On all those counts, New Jersey's proposed complaint must fail: (1) it has asserted a consumer-type cause of action that has no precedents in American jurisprudence; (2) it has alleged no sovereign or quasi-sovereign interest in taxes paid in Louisiana by private pipeline taxpayers; and (3) the only meaningful relief sought is a refund of taxes paid by those taxpayers. Even that relief is highly theoretical, for there is no assertion that New Jersey or its citizens will benefit in any way by a tax refund.

In sum, the real parties in interest are the private pipeline taxpayers. Those are the ones who have a true "case or controversy" with the State of Louisiana. All that New Jersey proposes to do, in filing its "indistinguishable" complaint, is to act as still another volunteer to help the taxpayers secure a refund. That hardly comports with the sovereign or quasi-sovereign interests of New Jersey or any other State.

Second, any action brought by one State against another violates the Eleventh Amendment if the Plaintiff State is actually suing to recover for injuries to designated individuals. *New Hampshire v. Louisiana*, 108 U.S. 76 (1883); *North Dakota v. Minnesota*, 263 U.S. 365, 376 (1923). The language of the Eleventh Amendment withdraws from the judicial power of the United States any suit commenced or prosecuted *by* citizens of one State *against* another State. Thus the Amendment is violated if private citizens assign or transfer their private claims to a State to prosecute in the name of that State. This Court has never

tolerated such subterfuge.

It should make no difference here that New Jersey proposes to volunteer as a tax refund agent for the private pipeline companies, rather than to receive the tax refund claims by assignment or some statutory scheme. See *New Hampshire v. Louisiana*, *supra*, where New Hampshire by statute volunteered to take by assignment any unpaid written obligation of another State and to bring such suits in this Court as may be necessary to recover the money due.

Enough has been said about this effort to subvert the original jurisdiction of this Court over true cases or controversies between States. The Court should simply decline to affirm the Special Master's recommendation that New Jersey be allowed to intervene in order to file what turns out to be a frivolous complaint.

III.

THE MOTION OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION TO INTERVENE AS PLAINTIFFS RAISES SERIOUS JURISDICTIONAL PROBLEMS

The Special Master's recommendation that the United States and the Federal Energy Regulatory Commission (hereinafter FERC) be allowed to "intervene as plaintiffs" is both premature and erroneous.

Such intervention was recommended in this case by virtue of Rule 24(b) of the Federal Rules of Civil Procedure, which deals with permissive intervention rather than intervention as of right. But Rule 24(b) does not deal with matters of jurisdiction, and it is well established that

> Intervention cannot cure any jurisdictional defect that would have barred the federal court from hearing the original action. Intervention presupposes the pendency of

> an action in a court of competent jurisdiction and cannot create jurisdiction if none existed before. However if there is an independent basis for jurisdiction with regard to the intervenor the court has discretion to treat his pleading as a separate action in order to adjudicate the claims raised by him.
>
> C. Wright and A. Miller
> 7A Federal Practice and
> Procedure, §1917,
> pp. 584-586 (1972).

See also *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157 (1914); *Kendrick v. Kendrick*, 16 F.2nd 744 (5th Cir. 1926), *cert. denied*, 273 U.S. 758; *Interstate Commerce Commission v. Southern Railway Co.*, 380 F. Supp. 386, 394 M.D. GA. 1974); *Jacobs v. District Director of Internal Revenue*, 217 F. Supp. 104 (S.D.N.Y. 1963).

The United States and FERC are thus stuck on the horns of a dilemma. On the one hand, their intervention cannot be allowed on the presupposition that this Court's original jurisdiction over the action brought by the Plaintiff States has been established. Until that jurisdiction has been authenticated, intervention is premature and should be withheld; there is simply no established main cause to which intervention may safely attach as an ancillary or subordinate adjunct. On the other hand, to the extent that the United States and FERC must rely on the existence of an independent basis for jurisdiction, no such basis is apparent.

United States Claims

The United States purports to invoke, as an independent basis of jurisdiction, the original jurisdiction of this Court under 28 U.S.C. §1251(b) (2) over "All controversies between the United States and a State." See Par. I of Complaint in Intervention. The United States accordingly must meet all Article III "case or controversy" requirements. *United States v. California*, 332 U.S. 19, 24-26 (1947). The "controversy" with the State of Louisiana that the United States asserts in its Complaint in Intervention is as follows:

VI.

The United States is a consumer of natural gas in the

operation of military and civilian installations and is thereby directly affected by the additional costs imposed by the Louisiana First Use Tax.

VII.

The United States is the lessor under leases authorizing various persons to produce natural gas from federal enclaves and the Outer Continental Shelf, over which it has exclusive jurisdiction (see 43 U.S.C. 1331-1343). It is believed that if the federal government's lessees are subject to Louisiana First Use Tax, the revenues received by the United States from its leases will be significantly reduced.

VIII.

Under Article I, Section 8, clause 3 of the Constitution, the federal government is responsible for the regulation of interstate and foreign commerce.

As respects the "consumer" controversy alleged in Paragraph VI, the claim suffers from the same defects apparent in the identical and "indistinguishable" claim made by New Jersey, as well as by the Plaintiff States. See pp. 22, 23 *supra*. In summary fashion, those defects are:

(1) The complaint of the United States does not allege that the injury for which it seeks redress was directly caused by the actions of the State of Louisiana. The "additional costs imposed by the Louisiana First Use Tax" are not alleged to have been directly imposed by Louisiana upon the military and civilian installations of the United States. That those installations may be "directly affected" by the additional costs imposed by the tax is not the equivalent of a direct tax imposed by Louisiana.

(2) The reference to military and civilian institutions being "directly affected" by the additional costs imposed by the First Use Tax is but another way of saying that the United States as a consumer or purchaser of natural gas is "directly affected" by any increase in the cost of that gas. But no consumer, whether it

be the United States, another State or a private citizen, has a cause of action against those governmental units that impose taxes upon the manufacturer or transporter of a given product, which taxes are "passed on" to the consumer in the form of increased costs.

(3) The true gravamen of the Complaint in Intervention is that the additional costs resulting from the First Use Tax have been passed on to consumers like the United States. But Louisiana is not responsible for such a passing-on. Rather, the responsibility ultimately lies with FERC, an agency of the United States. It was FERC that gave approval and sanction to the pipeline taxpayers' request that the costs of the tax be passed on to the consumers.[9] Thus the injuries claimed by the United States must be deemed "self-inflicted," *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). Nothing prevents the United States or FERC from withdrawing that approval, thereby forcing the private taxpayers to absorb the costs of the tax. In that circumstance, the United States cannot "be heard to complain about damage inflicted by its own hand," *Ibid.*

(4) It thus becomes apparent that the United States, as a consumer, is not a real party in interest in this litigation and cannot invoke this Court's original jurisdiction. *United States v. Minnesota*, 270 U.S. 181, 193 (1926). Indeed, the Complaint in Intervention that the United States proposes to file is an unabashed acknowledgment that the United States, like the State of New Jersey and the eight Plaintiff States, is acting solely

[9]FERC's authorization for passing on the cost of the First Use Tax from the taxpayers to the consumers is embodied in the following:

State of Louisiana First Use Tax in Pipeline Rate Cases, Docket No. RM 78-23, Order No. 10, "Order Establishing Procedures Governing Pipeline Recovery of the State of Louisiana First Use Tax," issued August 28, 1978, 43 Fed. Reg. 45, 553 (October 3, 1978); Order No. 10-A, "Order on Rehearing, Modifying Prior Order, Amending Regulation and Requesting Comment," issued December 20, 1978, 43 Fed. Reg. 60, 438 (December 28, 1978), Appeal Docketed, Tennessee Gas Pipeline Company v. Fed. Energy Regulatory Commission, No. 78-38-13, et al (4th Cir., December 26, 1978); and Order No. 10-B, "Order on Rehearing, Modifying Prior Order and Amending Regulations," issued March 2, 1979, 44 Fed. Reg. 13, 460 (March 12, 1979).

as a volunteer in assisting the pipeline taxpayers to obtain a refund of their taxes. Subparagraph (c) of the prayer for relief asks that the Court

> order that all revenues collected pursuant to the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce be refunded to the taxpayers together with interest thereon; . . . .

There is no recorded instance in the past where the United States has sought to invoke this Court's original jurisdiction to secure a tax refund for the benefit of private taxpayers. Suffice it to say that the novelty of this attempt does not support its legitimacy.

Paragraph VII of the Complaint in Intervention expresses a hazy belief that there may be a second kind of "controversy" as between the United States and Louisiana. "It is believed," we are told by Paragraph VII, "that if the federal government's lessees [on the Outer Continental Shelf] are subject to Louisiana First Use Tax, the revenues received by the United States from its leases will be significantly reduced." This allegation or belief is apparently the basis of the Special Master's comment (Report, p. A-6) that "the United States has a separate interest because of its responsibilities under the Outer Continental Shelf Act, 43 U.S.C. 1331-43."

For purposes of asserting standing or a cause of action, Paragraph VII is worthless. The United States of course has exclusive jurisdiction and responsibilities as to the Outer Continental Shelf. But it is not alleged that Louisiana's First Use Tax interferes with that jurisdiction or responsibilities in any way. The Shelf does not constitute a *res* before this Court as to which the United States and Louisiana are making conflicting claims. It is not alleged that the uses concerning which the tax is applicable, including the processing of the gas, in Louisiana is levied on the Shelf's producer-lesses, or that the tax is structured so as to discourage leasing gas wells on the Shelf. Nor is any kind of relief sought that would even arguably protect the interests of the United States with respect to the Shelf.

In short, as in *United States v. West Virginia*, 295 U.S. 463, 473 (1935), "there is presented here, as respects the State, no case of an actual or threatened interference with the authority of the United States." Until that authority is threatened with invasion by acts of the State, "there is no question presented which is justiciable by a federal court." *Ibid.* 474. See also *Commonwealth of Pennsylvania v. Kleppe*, 533 F.2nd 668, 672 (D.C. Cir. 1976), *cert. denied* 429 U.S. 977. Nor can a mere expression of belief, supplemented by use of the conditional word "if," do service for an allegation of injury in fact, either real or threatened, that gives rise to a real controversy.

Paragraph VIII of the Complaint in Intervention asserts that the Federal Government is responsible for the regulation of interstate and foreign commerce, citing the Commerce Clause of the Constitution. Presumably in this case, the United States cites this Clause to support its standing and its cause of action in its effort to strike down a state tax that allegedly is discriminatory against certain private interstate natural gas transporters.

But reliance on the Commerce Clause in this context is dubious and illusory. To begin with, it is Congress - not the Federal Government and not even the United States - that is given the power to "regulate" interstate commerce. Secondly, we are not dealing in this case with any problem as to the power of Congress to regulate the interstate transmission of natural gas. Rather we are concerned here with what Mr. Justice Jackson called one of "these great silences of the Constitution," *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 535 (1949), i.e. one of the "negative implications" of the Commerce Clause whereby this Court rather than the Constitution determines the doctrinal limitations on state interference with interstate commerce. L. Tribe, American Constitutional Law, 320-321 (1978).

The Complaint in Intervention mistakenly assumes that the United States (inexplicably renamed "the federal government" in Paragraph VIII) is responsible for the enforcement of the

negative implications of the Commerce Clause. When we are dealing with negative implications we are dealing with state police powers to regulate and tax interstate commerce up to the point where this Court determines that the exercise of such power collides with the superior regulatory power of Congress. The bottom line, however, is the fact that the beneficiaries of the negative implications of the Commerce Clause are those interests or entities that are themselves engaged in commerce.

Generally, then, the commercial interests and entities are the ones with standing to protest some state tax or regulation imposed on their interstate activities. Unless a government body is itself engaged in some form of interstate commerce, governmental representatives have no roving commission to champion the cause of the commercial beneficiaries of the negative implications of the Commerce Clause. This Court recognized that fact in *Louisiana v. Texas*, 176 U.S. 1, 19 (1900), when it ruled that "the vindication of the freedom of interstate commerce is not committed to the State of Louisiana." By the same token, it is not committed to the United States or "the federal government."[10]

FERC Claims

The Special Master indiscriminately has recommended that both the United States and FERC be allowed to "intervene as plaintiffs" in this original proceeding. And both the United States and FERC join in a Complaint in Intervention, Paragraph I of which asserts that the original jurisdiction of this Court under 28 U.S.C. §1251(b) (2) is invoked.

Whatever may be the problems associated with the efforts of the United States to become a party plaintiff in this case, they pale in comparison with the difficulties confronting FERC. By

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[10]The United States does have standing to protest the physical clogging of interstate channels. See *New York v. New Jersey*, 256 U.S. 296, 303-308 (1921); *Sanitary District of Chicago v. United States*, 266 U.S. 405 (1925). But the more intangible burdens on commerce imposed by state taxation or regulation are equite another matter.

what authority does an agency of the United States seek to invoke the original jurisdiction of this Court? Where is the precedent for such an agency suing a sovereign State in this Court, even by way of intervention? Cf. *United States v. West Virginia*, 295 U.S. 463 (1935), where the United States unsuccessfully sought leave to file a complaint in its name only in a matter in which the Federal Power Commission was much involved.

The Special Master sought to justify FERC's intervention as a plaintiff by reference to the provisions in Rule 24(b) that permits a federal or state governmental officer or agency to intervene in any case where a party relies for ground of claim or defense upon a statute or executive order administered by that agency or officer. But Rule 24(b) cannot be superimposed so cavalierly on top of this Court's very limited and sparingly exercised original jurisdiction. If FERC is not authorized by Article III or §1251(b) (2) to invoke the original jurisdiction of this Court in suits involving a State, Rule 24(b) cannot give FERC that power to invoke through the intervention medium.

Moreover, the interest of FERC in entering this original action as a plaintiff is not evident. Paragraph IX of the Complaint in Intervention states that FERC, by virtue of the Natural Gas Act and the Natural Gas Policy Act of 1978, has exclusive authority to set rates for the sale and transportation of natural gas in interstate commerce. FERC also is responsible for the regulation of the interstate sale and transportation of natural gas and the cost and rates of pipelines, including the apportionment of costs among producers, processors, and consumers of natural gas.

Without further ado, Paragraph IX suddenly announces that the Louisiana First Use Tax "conflicts with the federal regulation of the sale and transportation of natural gas in interstate commerce and is therefore invalid under the Supremacy Clause of the Constitution." The thought is added that because the "principal impact of the tax is to increase the price of gas" extracted from the Outer Continental Shelf or otherwise shipped through Louisiana in interstate commerce, "the Louisiana tax is incompatible with the federal regulatory scheme."

But at no point in Paragraph IX, or anywhere else for that matter, is there any claim or specification that a particular provision of the Natural Gas Act or the Natural Gas Policy Act of 1978 has been violated.[11] Nor is there any articulation of the points at which the First Use Tax "conflicts with" or becomes "incompatible with" the federal regulatory scheme. There is nothing but the "hit-and-run" technique of pleading conflicts and incompatibility, in the hope that somehow this Court will ferret out some true conflicts and thus protect the interest of FERC - as the prayer for relief requests.

The failure of Paragraph IX to cite any conflicts renders meaningless the Supremacy Clause claim, even assuming that Clause is a viable basis for invoking this Court's original jurisdiction at the behest of a federal agency. It is instructive to note that the basic question involved in a preemption claim "is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes." *Swift & Co. v. Wickham*, 382 U.S. 111, 120 (1965). But if the original business of this Court permits it to compare two or more statutes, it should be advised precisely what parts of which statutes are to be compared.

Perhaps FERC means to say that the First Use Tax is a cost, and thus is subject to FERC's superior power of regulating all costs associated with the sale and transportation of natural gas. The difficulty with this argument, however, is that Section 110 of the Natural Gas Policy Act of 1978, 15 U.S.C. §3320, authorizes FERC to include in the maximum lawful first sale price "any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas." Pursuant to Section 110, FERC has considered the Louisiana First Use Tax to be a cost of processing and thus eligible to be incorporated in the maximum first sale price set by FERC. That is the sense of

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[11]Section 505 of the Natural Gas Policy Act of 1978, 15 U.S.C. §3414, allows FERC to institute injunction proceedings in federal courts where there is a violation of the Act. No such violation has been charged in the administration of the First Use Tax.

FERC's Orders 10, 10-A and 10-B,[12] and that is why the cost of the Louisiana First Use Tax has been passed on to the consumers. Moreover, that is why Louisiana is in no way responsible for adding the cost of the First Use Tax to the cost of gas.

In truth, there is no substance whatever in the Paragraph IX claim of conflict and incompatibility. The First Use Tax has meshed very neatly into the operation and administration of the Natural Gas Policy Act. The State of Louisiana suggests that this Court's original jurisdiction should not be encrusted with such statutory trivia. Paragraph IX must fail for lack of a substantial question.

The Special Master, in recommending that the intervention motion of the United States and FERC be granted, stated that it would not only be "highly desirable" to join the United States as a party but that the Court has permitted intervention by the United States "under comparable circumstances" in cases involving disputes between two or more States. (Report, pp. A-5, A-6.) Unfortunately, the cited cases do not bear out those remarks. In two, *Wisconsin v. Illinois*, 278 U.S. 367 (1929), and *New Jersey v. New York*, 345 U.S. 369, 373 (1953) the United States at no time appeared as an intervenor. In the other three cases, *Texas v. Louisiana*, 410 U.S. 702, 712-714 (1973); *Arizona v. California*, 344 U.S. 919 (1953); *Oklahoma v. Texas*, 253 U.S. 465 (1920), the United States was allowed to intervene in disputes over claims of land or water. The latter cases are quite different from the instant one in that they involved *in rem* disputes. The *in personam* circumstances of this case could hardly be less comparable.

The State of Louisiana accordingly renews its exception to the Special Master's recommendation that both the United States and FERC be allowed to intervene as plaintiffs.

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[12]These orders are cited in footnote 9, *supra*, page 30.

IV.

INTERVENTION OF PIPELINE COMPANIES AS PLAINTIFFS DESTROYS THE JURISDICTION OF THIS COURT

In recommending the intervention as plaintiffs of the seventeen private pipeline parties, the Special Master acknowledged that the First Use Tax "falls directly" on them, that they are "directly liable" for its payment, and "would therefore be the taxpayers presumably entitled to recover taxes already paid if the [Louisiana] act were declared unconstitutional and repayment ordered." (Report, p. A-7.)

The State of Louisiana has no quarrel with any of those findings. It is common ground in this case that these pipeline companies are the real parties in interest as to the First Use Tax. They might even be deemed indispensable parties to this tax controversy. And it would appear uncontestable that the only real "case or controversy" is that between the pipeline companies and the State of Louisiana. That is the "controversy," of course, that is currently going forward in the pipelines' tax refund suit in the Louisiana state courts.

Intervention by Improper Parties

The first point of departure for the State of Louisiana is the Special Master's proposition that the pipeline companies should be allowed intervention here despite the fact that they would not be proper parties to an original action. (Report, p. A-8.) That conclusion proceeds upon the mistaken assumption that this Court "has held that the Constitutional limitations on original actions before it does not prevent intervention by private parties once the Court has been given jurisdiction of the case." *Ibid.*

With all due respect to the Special Master, the State of Louisiana submits that quite the opposite is true, for the following reasons:

(1) As demonstrated in Part I of this brief, this Court has yet to resolve the jurisdiction problems pertaining to the filing of the complaint of the eight Plaintiff States. Hence it is not yet a fact that this Court "has been given jurisdiction of [this] case."

(2) The Special Master's reliance on *Oklahoma v. Texas*, 258 U.S. 574 (1922), and *Texas v. Louisiana*, 416 U.S. 965 (1974), for the thesis that a non-state party can be allowed to intervene without destroying the jurisdiction of the Court is misplaced. Both those cases involved adverse claims to property by two contiguous States, where there never was any question as to the original and exclusive jurisdiction of this Court. Permitting other non-state property claimants to intervene could not possibly have affected the Court's jurisdiction once it had properly been invoked as to the two contesting States. Once the Court's jurisdiction attached to the property *in rem*, it acquired ancillary jurisdiction to consider all claims thereto.

As the Court explained in *Oklahoma v. Texas*, 258 U.S. at 581,

> In its first stage this was a suit by one state against another. When the United States intervened it became also a suit by the United States against those states. In its enlarged phase, it presents in appropriate form the conflicting claims of the two states and the United States to the river bed, and calls for their adjudication. The other claims, being for particular tracts and funds in the receiver's possession and exclusively under our control, are brought before us because no other court lawfully can interfere with or disturb that possession or control. It long has been settled that claims to property or funds of which a court has taken possession and control through a receiver or like officer may be dealt with as ancillary to the suit wherein the possession is taken and the control exercised, *—and this although independent suits to enforce the claims could not be entertained in that court.* [Emphasis added]

Similarily, in *Texas v. Louisiana*, 426 U.S. at 466, the City of Port Arthur, Texas, "was permitted to intervene for purposes of protecting its interest in the island claims of the United States." This intervention was allowed after the dispute between Texas

and Louisiana had been resolved and after the United States was allowed to intervene (414 U.S. 1107) to assert its claim of ownership to the islands in question.

(3) The Special Master's comment that constitutional limitations on original actions, once jurisdiction attaches, are irrelevant in assessing intervention is wrong for quite another reason. As pointed out long ago in *California v.Southern Pacific Co.*, 157 U.S. 229, 257-258 (1895), this Court's original jurisdiction "depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties and those only. Among those in which jurisdiction must be exercised in the appellate form are cases arising under the Constitution and laws of the United States. In one description of cases the character of the parties is everything, the nature of the case nothing. In the other description of cases the nature of the case is everything, the character of the parties nothing."

This point comes out most clearly in cases initiated here by a State suing a citizen of another State, a situation where "the character of the parties is everything." In a series of cases brought by a State against a defendant citizen of another State, the Court has held that even after original jurisdiction has properly been invoked in the first instance the action must be dismissed if the State joins one of its own citizens as a defendant. *California v. Southern Pacific Co., supra; New Mexico v. Lane*, 243 U.S. 52, 57-58 (1917); *Minnesota v. Northern Securities Co.*, 184 U.S. 199 (1902); *Texas v. I.C.C.*, 258 U.S. 158, 164 (1922); *Louisiana v. Cummins*, 314 U.S. 577 (1941); and see *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 463-464 (1945). The single exception is where the citizens of the plaintiff State is joined as a mere formal or nominal party. *Florida v. Anderson*, 91 U.S. 667, 676-677 (1875). The same result would clearly follow if the real party in interest intervenes as a party defendant in such a suit.

This case involves another facet of original jurisdiction where "the character of the parties is everything," i.e. a suit brought by one State against another State. Intervention as a *party plaintiff*

in such a case must be carefully screened. If it becomes clear, even after filing of the complaint has been allowed, that the real party in interest is a private person, the plaintiff State may lose its capacity to continue such a suit, for the State can sue only on its own behalf and not on behalf of particular citizens or individuals. See *Louisiana v. Texas*, 176 U.S. 1 (1900); *Oklahoma v. Atchison, T.&S.F. Co.*, 220 U.S. 277 (1911). That the private real party in interest makes himself known as a putative intervenor would not appear to change this jurisdictional problem.

Indeed, constitutional consequences can ensue if the private party intervenes as a party plaintiff in such an original suit. Not only may the entry of the private party reveal the shallowness of the plaintiff State's status but it may implicate the Eleventh Amendment's ban on suits against a State by a citizen of another State. See, e.g., *New Hampshire v. Louisiana*, 108 U.S. 76 (1883); *North Dakota v. Minnesota*, 263 U.S. 365, 386 (1923). It is at this point that the State of Louisiana makes its second break with the Special Master's reasoning respecting intervention as plaintiffs by the real private parties in interest, the pipeline taxpayers.

Eleventh Amendment Problems

The State of Louisiana takes exception to the Special Master's view that the applicability of the Eleventh Amendment can be reserved until the final decision of the case. (Report, p. A-8). If the Amendment is applicable, it is applicable here and now. Allowing these private parties in now as plaintiffs will so drastically charge the jurisdictional atmosphere of the case as to call for its instant dismissal. Indeed, the damage may already have been done.

From the moment the complaint of the eight Plaintiff States was drafted, let alone filed, it has been obvious that the only real parties in interest in this tax controversy are the private pipeline taxpayers. That complaint and each succeeding complaint in intervention have sought not only a declaration of invalidity but

one concrete form of relief — a refund of the taxes paid by these taxpayers.

The whole purpose of the Eleventh Amendment was to protect States like Louisiana from being forced to respond in this Court, or any other federal court, to tax refund claims asserted by citizens of other States. That the claim is asserted at this time by the putative intervenors — the taxpayers — does not soften the fact that the complaint of the Plaintiff States inplicated the Eleventh Amendment from the start. Nor does it alter the fact that the United States and FERC, while not technically bound by the Eleventh Amendment, have joined in pursuit of the tax refund claims of the private pipeline companies.

The short of it is that however and how many times it becomes clear that the Plaintiff States are posing as surrogates for private claimants, the Eleventh Amendment erects an absolute bar to continuation of an original action in this Court. At this point, not at the end of the case, the principle of the Eleventh Amendment comes into effective operation. The entire judicial power granted by the Constitution does not embrace authority in this Court to entertain such a suit, particularly in the absence of the State's consent. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934).

Without doubt, this is one of the most important jurisdictional problems ever to be brought to this Court's original docket. None of the cases cited by the Special Master come even close to answering the Eleventh Amendment problems that populate this case. e.g., *Utah v. United States*, 394 U.S. 89 (1969); *New Jersey v. New York*, 345 U.S. 369, 372 (1953). Not the least troublesome of these problems is the Special Master's remark (Report, pp. A-8, 9) that to "relegate the pipelines to their remedy in the Louisiana courts would result in duplicative litigation with the possibility of conflicting results."

The State of Louisiana can reply only that the original jurisdiction of this Court and the prudential considerations that underlie it are too vital to permit them to be undermined by a concern that private taxpayers, fully able to assert their own

rights, might have to pursue the remedy that they themselves have chosen to follow in the Louisiana courts. The exercise of this Court's original jurisdiction is not an award to private parties who seek by intervention "to assert their claim directly [in this Court] rather than relying on the states, of which they are not even citizens, to assert their claims for them" (Report, p. A-8.)

The recommendation that the seventeen pipeline companies be allowed to intervene as plaintiffs must be rejected.

V.

THE AMICUS CURIAE BRIEF

The State of Louisiana has excepted to the recommendation that the motion of Associated Gas Distributors for leave to file a brief *amicus curiae* be granted at this time. Since the brief is in support of the motion of the Plaintiff States for judgment on the pleadings, in a case in which jurisdiction of this Court to continue the case is in such peril, there appears little if any reason for filing such a brief at this time.

CONCLUSION

For these various reasons, the State of Louisiana requests that all of its Exceptions to the Special Master's Report, dated May 14, 1980, be sustained.

All of the above and foregoing is thus respectfully submitted.

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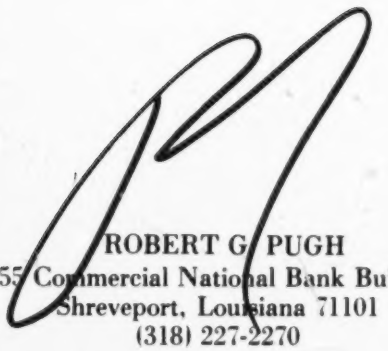

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CERTIFICATE OF SERVICE

I, ROBERT G. PUGH, counsel of record for the State of Louisiana in the above-entitled proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the 9th day of July, 1980, I served copies of the *Exceptions of the State of Louisiana to the Report of Special Master dated May 14, 1980 and Brief in Support Thereof*, by depositing three copies thereof in a United States mailbox, with postage prepaid, addressed to counsel of record at his or her post office address. Their names and addresses are as follows:

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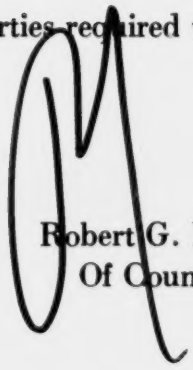

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APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 83, ORIGINAL

STATE OF MARYLAND, *et. al.*,
Plaintiffs,

v.

STATE OF LOUISIANA,
Defendant.

ON MOTIONS FOR LEAVE TO INTERVENE AND
TO APPEAR AS *AMICUS CURIAE*

REPORT OF SPECIAL MASTER

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Special Master

May 14, 1980

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 83, ORIGINAL

STATE OF MARYLAND, *et. al.*,
Plaintiffs,

v.

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REPORT OF SPECIAL MASTER

By order of the Court dated March 3, 1980, the undersigned was appointed Special Master in the above entitled case. By the same order motions of Columbia Gas Transmission Corporation and sixteen other pipelines, and of the State of New Jersey for leave to intervene were referred to the Special Master.

Thereafter, on April 2, 1980, the United States and the Federal Energy Regulatory Commission filed a motion for leave to intervene. Although no specific order of reference of this motion has been made to the Special Master, he assumes for the purpose of this report that he is authorized to advise the Court as to the disposition of the motion pursuant to the provision in the order of March 3, 1980, that "the Special Master is directed to

submit such reports as he may deem appropriate." The Special Master finds that a report on the motion of the United States and the Federal Energy Regulatory Commission to intervene is appropriate in order to permit the proceedings to be carried forward without further delay.

The order of March 3, 1980, also referred to the Special Master a motion of Associated Gas Distributors for leave to file a brief *amicus curiae in support of the plaintiff's motion for judg*ment on the pleadings.

This report deals with the above motions. No report is now made on the motion for judgment on the pleadings since the Special Master finds such a report at the present time would be premature pending further presentations to the Special Master by the parties on the need to hold evidentiary hearings in the case.

FACTS

So far as is necessary for the disposition of these motions, this action was initiated by a motion for leave to file a bill of complaint in an original action made on March 29, 1979, by the states of Maryland, Illinois, Indiana, Massachusetts, Michigan, New York, Rhode Island and Wisconsin. The attached complaint alleged the unconstitutionality of a Louisiana statute, designated as R.S. 47:1301-1307, imposing a "first use tax" on natural gas produced from the Outer Continental Shelf and federal enclaves, and other imported gas moving into Louisiana. The Louisiana statute is alleged to violate the commerce clause of the United States Constitution as well as the supremacy clause, the import-export clause and equal protection of the law. Over the opposition of Louisiana the Court on June 18, 1979, granted the motion for leave to file the complaint. On August 17, 1979, Louisiana filed an answer to the complaint addressing each paragraph of the complaint and asserting the legality and constitutionality of the statutes attacked and further asserting that many factual controversies were raised by the pleadings

necessitating evidentiary hearings. The plaintiffs have filed a motion for judgment on the pleadings and Louisiana has filed a motion to dismiss the complaint. These motions are still pending, but, in the view of the Special Master, are not ripe for determination pending further presentations by the parties.

On September 24, 1979, Columbia Gas Transmission Corp. and sixteen other pipeline companies filed motions to intervene as parties plaintiff and to file complaints which alleged that the first use tax makes them liable for the payment of the tax and deprives them of protections afforded by the Constitution. On September 24, 1979, Louisiana filed an opposition to this motion.

On October 22, 1979, the State of New Jersey filed a motion for leave to intervene as a party plaintiff alleging facts comparable to those alleged by the complaining states and asserting the same claims as to the unconstitutionality of the Louisiana statutes. On December 3, 1979, Louisiana filed an opposition to this motion.

On April 2, 1980, the United States and the Federal Energy Regulatory Commission filed a motion for leave to intervene and file an intervention complaint alleging their interests as the federal agency responsible for natural gas regulation, as the lessor of gas producing property on the outer continental shelf, and as a consumer of natural gas subjected to the tax. The complaint alleges the unconstitutionality of the Louisiana statutes both under the commerce clause and the supremacy clause. At the date this report was prepared, no response to this motion had been filed by Louisiana.

On October 24, 1979, Associated Gas Distributors filed a motion for leave to file a brief *amicus curiae* in support of the plaintiffs' motion for judgment on the pleadings. Although some of the parties withheld consent to filing this brief, making the motion for leave to file necessary, no formal opposition has been filed.

RECOMMENDATIONS

I.

NEW JERSEY'S MOTION FOR LEAVE TO FILE AN INTERVENING COMPLAINT.

It is not contested that the complaint which New Jersey moves to file is virtually indistinguishable from the complaint of the State of Maryland and its co-plaintiffs. New Jersey merely adds the facts applicable to it and its citizens. Under these circumstances it would seem clear that, had New Jersey opted to file a wholly independent original action, the Court in order to act consistently with its action in the Maryland case, would have granted the motion. Filing as an intervenor has the advantage of promoting judicial economy and placing New Jersey on an equal footing with the eight states in the original suit. No claim has been made that permitting intervention will unduely delay or prejudice the adjudication of the rights of the original parties. Granting the motion appears to be consistent with past Supreme Court practice, *Pennsylvania v. Connecticut*, 401 U.S. 931, and with the standard provided by Rule 24(b) of the Federal Rules of Civil Procedure, which by Rule 9 of this Court's Rules may be taken as a guide to procedure in original actions in this Court where their application is appropriate. The applicant's claim and that in the main action have common questions of fact and law.

The Special Master recommends that the motion of New Jersey to intervene and file its complaint be granted.

II.

MOTION OF THE UNITED STATES AND FEDERAL REGULATORY COMMISSION TO INTERVENE AND FILE A COMPLAINT IN INTERVENTION.

The interest in the dispute of the United States and the Commission is somewhat different from that of the original plaintiffs. However, from the point of view of completing the litigation with the participation of all parties which have a direct and important interest in it, it is not only appropriate, but highly desirable that the United States be joined as a party. *Cf. Texas v. Louisiana*, 410 U.S. 702, 712-14. Apart from its interest as a consumer of natural gas, the United States has a separate interest because of its responsibilities under the Outer Continental Shelf Act, 43 U.S.C. 1331-43. The Federal Energy Regulatory Commission is involved as the administrative agency responsible for the execution of the Natural Gas Act, 15 U.S.C. 717-717w and the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3351. Rule 24(b) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 9 of the rules of this Court, provides:

> When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action.

In this case the plaintiffs do in fact rely upon actions of the United States and the Federal Energy Regulatory Commission under both the Outer Continental Shelf Act and the Natural Gas Acts for their claims as to the unconstitutionality of the first use tax.

In the past the Court has permitted the United States to intervene under comparable circumstances in original cases involving disputes between two or more states. *Wisconsin v. Il-*

linois, 278 U.S. 362; *Arizona v. California*, 344 U.S. 919; *Oklahoma v. Texas*, 253 U.S. 465; *New Jersey v. New York*, 345 U.S. 369, 373.

The Special Master recommends that the motion of the United States and the Federal Energy Regulatory Commission to intervene as plaintiffs be granted.

III.

MOTION OF COLUMBIA GAS TRANSMISSION CORPORATION AND SIXTEEN OTHER PIPELINES TO INTERVENE AS PLAINTIFFS.

The interests of the pipelines in the outcome of this suit is direct and material. The first use tax falls directly on the pipelines who own and control the gas at the time the tax is imposed and who are directly liable for its payment. It is asserted that the amount involved annually is $250,000,000. The pipelines would therefore be the taxpayers presumably entitled to recover taxes already paid if the act were declared unconstitutional and repayment ordered. Moreover, since the pipelines have been permitted to pass the cost of the tax along to the purchasers of the gas, it has a direct effect on the price of the gas to the ultimate consumer and therefore its competitive position with respect to competing fuels.

While the interests of the pipelines differ from those of the states and the United States, their claims of unconstitutionality raise the same issues and require the same proof as the others. Therefore, to permit the pipelines to participate as parties should not complicate the trial of the case, delay it, or prejudice the rights of the original parties.

Louisiana, which opposes the intervention, argues that the pipelines are not proper parties to an original action since they could not have commenced it in the first place. However, the Court has permitted the intervention of non-states in original actions once the Court has taken jurisdiction of a case. *Oklahoma*

v. Texas, 258 U.S. 574; *Texas v. Louisiana*, 416 U.S. 965. Very clearly the Court has held that the Constitutional limitations on original actions before it does not prevent intervention by private parties once the Court has been given jurisdiction of the case.

Louisiana asserts that the Eleventh Amendment, denying jurisdiction in the federal courts over suits against a state by a citizen of another state, prevents the intervention of the pipelines, which are citizens of various states other than Louisiana. Without specifically addressing the issue of the impact of the Eleventh Amendment, this Court has permitted the intervention of private parties in opposition to states which were parties to original actions. *Oklahoma v. Texas*, 258 U.S. 574; *Texas v. Louisiana*, 416 U.S. 965. The question as to the applicability of the Eleventh Amendment was left open in *New Jersey v. New York*, 345 U.S. 369, 372. And in *Utah v. United States*, 394 U.S. 89, where a Special Master had found that the state had not waived its sovereign immunity, the court agreed to the denial of intervention, but not on the ground that was suggested by the Special Master. The Court found that the issues in the case had been narrowed by stipulation and suggested that absent that stipulation "Morton's right to intervene would have had a substantial basis. ... it would have been fairest to permit Morton to speak for itself." 394 U.S. at 92.

Intervention appears to me materially different from an original suit against a state by a citizen of another state. Here Louisiana is already a party to a proceeding in which the validity of its tax is under attack. If it loses the suit, it would presumably be liable to repay the taxes already collected and intervention of the pipelines would not constitute an additional claim against the assets of the state. Nor would it affect the future imposition of the tax, which would be forbidden or permitted depending on the outcome of the suit by Maryland and its sister states. The difference would be that of permitting the pipelines to assert their claim directly rather than relying on the states, of which they are not even citizens, to assert their claims for them. To relegate the pipelines to their remedy in the Louisiana courts

would result in duplicative litigation with the possibility of conflicting results.[1]

The Special Master recommends that for the purpose of expeditiously carrying forward these proceedings the pipelines be permitted to intervene, reserving the final determination of the applicability of the Eleventh Amendment until the final decision of the case.

IV.

MOTION OF ASSOCIATED GAS DISTRIBUTORS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS.

The interest of the Association in this proceeding arises from the fact that it is an association of gas distributors serving eleven million customers along the eastern seaboard. It asserts that more than half of the gas sold by its members comes from the Outer Continental Shelf and has moved through Louisiana, thus being subjected to that state's first use tax. The cost of the tax has been passed on to them and by them to their customers. In the brief *amicus curiae* attached to the motion it is argued that the tax is unconstitutional under both the supremacy clause and the commerce clause.

While the argument of the Association differs in minor detail from that of the pipelines, the pipelines are not now parties and the views of the distributors may be helpful in the disposition of the case.

---

[1]The pipelines assert a waiver of immunity by a Louisiana statute permitting a suit at law in state or federal courts to recover the tax if paid under protest. La. R.S. 47:1576. Louisiana responds that the consent to be sued does not cover the type of action here involved. The Special Master makes no recommendation on the resolution of this dispute since he believes the grant of the motion is appropriate apart from any waiver of immunity.

The Special Master recommends that the motion of Associated Gas Distributors for leave to file a brief *amicus curiae* supporting the plaintiffs' motion for judgment on the pleadings be granted.

Respectfully submitted,

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May 14, 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 83, Original

STATE OF MARYLAND, *et al.*,
Plaintiffs

versus

STATE OF LOUISIANA

RESPONSE OF PIPELINE COMPANIES TO LOUISIANA'S EXCEPTIONS TO SPECIAL MASTER'S REPORT OF MAY 14, 1980

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RESPONSE OF PIPELINE COMPANIES TO LOUISIANA'S EXCEPTIONS TO SPECIAL MASTER'S REPORT OF MAY 14, 1980

STATEMENT

This original proceeding brought by Maryland *et al.* (plaintiff States) involves an attack on numerous grounds upon the constitutionality of Louisiana's so-called First Use Tax on Natural Gas (Tax) enacted in 1978, La. R.S. 47:1301 *et seq.* The statute imposes a tax of seven cents per Mcf principally upon natural gas produced from the outer continental shelf and transported through Louisiana to various other states. It

purports to be assessed upon the first "use", as therein defined, of the natural gas within Louisiana and its incidence falls directly upon the pipeline companies which purchase the gas at the wellhead and transport it for eventual use and resale in and outside Louisiana.[1]

Following the Court's grant, over Louisiana's strong opposition, of the plaintiff States' motion for leave to file complaint on June 18, 1979 (442 U.S. 937), seventeen pipeline companies on August 28, 1979, jointly filed a motion for leave to intervene as plaintiffs.[2] Pointing out, *inter alia,* that the incidence of the Tax was upon them,[3] the pipelines alleged that they had substantial interests which, while different from those of the plaintiff States in certain material respects, would nevertheless be

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[1]The Tax and related laws enacted at the same time contain a series of exemptions and credits which serve to limit the Tax's scope as summarized in the text. See Appendices A to D to pipelines' motion to intervene filed August 28, 1979.

[2]The pipelines companies seeking intervention, all interstate natural gas companies subject to regulation by the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, and the Natural Gas Policy Act, 15 U.S.C. 3301 *et seq.*, are Columbia Gas Transmission Corporation, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Florida Gas Transmission Company, Michigan Wisconsin Pipe Line Company, Mississippi River Transmission Corporation, Natural Gas Pipeline Company of America, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Sea Robin Pipeline Company, Southern Natural Gas Company, Tennessee Gas Pipeline Company, a Division of Tenneco, Inc., Texas Eastern Transmission Corporation, Texas Gas Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company and United Gas Pipe Line Company.

[3]The pipelines' motion estimated that their obligation under the Tax would aggregate nearly $275,000,000 in the first year alone.

affected directly and materially by the Court's disposition of the case.[4] The proposed complaint attached to the pipelines' motion raised the same constitutional issues as those raised by the plaintiff States. On September 24, 1979, Louisiana filed its opposition to the pipelines' motion, to which the pipelines responded on October 9, 1979.

In the meanwhile, on September 4, 1979, the plaintiff States filed a motion for judgment on the pleadings which was later supported by separate pleadings filed by the pipelines as well as jointly by the United States and FERC.[5] On October 22, 1979, Louisiana filed a motion to dismiss the complaint along with an opposition to the motions for summary disposition.[6]

On March 3, 1980, the Court issued its order appointing a Special Master, ____ U.S. ____, 100 S. Ct. 1271 (1980). In the order the Court expressly listed all the pending motions other than Louisiana's motion to dismiss as being referred to the Special Master for his recommendation. Following a hearing on March 26,

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[4]The pipelines' pleadings further noted that in contrast to the plaintiff States, they were deeply involved in the day-by-day operations of the natural gas industry and hence had superior ability to marshall facts should a full factual development be found to be necessary.

[5]Hereinafter sometimes collectively referred to as the United States.

[6]Also, on October 22, 1979, the State of New Jersey filed its motion for leave to intervene to which was attached its proposed complaint, raising the same constitutional issues as the plaintiff States.

1980, the United States on April 2, 1980, filed a motion for leave to intervene to which was attached a proposed complaint raising the same constitutional issues as the plaintiff States.

On May 14, 1980, the Special Master issued his Report recommending the granting of all intervention requests. With regard to the pipelines, the Special Master noted that their interest "in the outcome of this suit is direct and material" (Rep., p. 6) and that while their interests differed from those of the plaintiff States,

> . . . their claims of unconstitutionality raise the same issues and require the same proof as the others. Therefore, to permit the pipelines to participate as parties should not complicate the trial of the case, delay it, or prejudice the rights of the original parties. . . (Rep., p. 7).

Further, the Special Master rejected Louisiana's contention that the pipelines are not proper parties to the proceedings since they could not have commenced it in the first place, observing in pertinent part (Rep., p. 7):

> . . . the Court has permitted the intervention of non-states in original actions once the Court has taken jurisdiction of a case. *Oklahoma v. Texas,* 258 U.S. 574; *Texas v. Louisiana,* 416 U.S. 965. Very clearly the Court has held that the Constitutional limitations on original actions before it does not prevent intervention by private parties once the Court has been given jurisdiction of the case.

Finally, noting several of the reasons militating against adoption of Louisiana's Eleventh Amendment arguments, the Master concluded with the recommendation that (Rep., pp. 8-9):

> . . .for the purpose of expeditiously carrying forward these proceedings the pipelines be permitted to intervene, reserving the final determination of the applicability of the Eleventh Amendment until the final decision of the case.[7]

ARGUMENT

THE SPECIAL MASTER'S RECOMMENDATION THAT THE PIPELINES BE PERMITTED TO INTERVENE IS SUPPORTED BY ALL APPLICABLE PRINCIPLES

A. Louisiana Does Not Question That The Pipelines Satisfy The Requirements For Intervention

Louisiana (Br., p. 37) specifically notes that it "has no quarrel with" the Special Master's findings that

> the First Use Tax "falls directly" on . . . [the pipelines], that they are "directly liable" for its payment, and "would therefore be the taxpayers presumably entitled to recover

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[7]See Memorandum Opinion in *Oklahoma v. Texas*, 257 U.S. 609 (1921) and Opinion in that case at 258 U.S. 574 (1922) (allowing proposed intervenors to appear and participate in hearings prior to decision on their motions to intervene).

> taxes already paid if the [Louisiana] act were declared unconstitutional and repayment ordered." (Report, p. A-7).

Under well settled principles, the facts thus admitted clearly establish the propriety of permitting intervention by the pipelines. See, e.g., *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977); *Donaldson v. United States*, 400 U.S. 517, 531 (1971); *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10 (1972); *Arizona* v. *New Nexico*, 425 U.S. 794, 797-798 (1976). As shown below, the various arguments by which Louisiana seeks to counteract the effect of these admissions have neither merit nor substance. Significantly, Louisiana has not suggested, and cannot suggest, that it would be harmed if the pipelines' intervention is allowed, whereas the detriment to the pipelines, if they are not allowed to participate in this action which would decide the constitutionality of the Tax, is obvious.

B. The Plaintiff States Are Not Surrogates For The Pipelines

Louisiana's contention (e.g., Br. p. 41) that the plaintiff States are "posing as surrogates" for the pipelines is made of whole cloth. As the premise for this argument, Louisiana asserts (Br., p. 37):

> It is common ground in this case that these pipeline companies are the real parties in

> interest as to the First Use Tax. They might even be deemed indispensable parties to this tax controversy. And it would appear uncontestable that the only real "case or controversy" is that between the pipeline companies and the State of Louisiana.

These assertions, however, misstate the true situation. Although the pipeline companies are real parties in interest, this does not mean that they are the *only* such parties as Louisiana in effect contends. To the contrary, the plaintiff States are also real parties in interest. Louisiana's several arguments (Br., pp. 37-40) purporting to show otherwise are far-fetched and strained.[8]

To be sure, many of the arguments advanced by the pipelines are also advanced by the plaintiff States in attacking the Tax on constitutional grounds. But these arguments are in furtherance of their own direct interests which they are seeking to advance and protect, quite apart from those of the pipelines.

Accepting the premise that the plaintiff States have properly invoked this Court's original jurisdiction, no amount of circular reasoning can relegate them to the status of mere surrogates for the pipelines. To the contrary, each has significant interests of its own at issue in the case.

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[8]See Brief of plaintiff States in Support of Motion for Leave to File Complaint dated March 29, 1979 and their Brief in Opposition to Motion to Dismiss dated November 14, 1979.

In a word, Louisiana's argument improperly ignores the distinction between litigants seeking to invoke the original jurisdiction of the Court and those (such as the pipelines) seeking to intervene in an action as to which the original jurisdiction of the Court has already been properly invoked by the original plaintiffs.

C. Article III Of the Constitution Does Not Bar Intervention By Non-State Parties In Original Proceedings Between States

Louisiana treats the pipelines' intervention as a separate action to be consolidated with the States' suit. It is not. It is a matter ancillary to the dispute between the plaintiff States and Louisiana, and therefore within the Court's ancillary jurisdiction. It does not require independent jurisdictional grounds. In this regard, it should be noted that Louisiana (Br., p. 38) does not deny that, as found by the Special Master (Rep., p. 7), the Court permitted intervention of non-state parties in *Oklahoma v. Texas,* 258 U.S. 547 (1922) and *Texas v. Louisiana,* 416 U.S. 965 (1974), 426 U.S. 465 (1976).

Instead, Louisiana seeks to distinguish these cases on the ground that they are limited to *in rem* proceedings; according to Lousiana (Br., p. 38):

> Once the Court's jurisdiction is attached to the property *in rem,* it acquired ancillary jurisdiction in considering all claims thereto.

But, while it is true that these cases involved *in rem* situations, the distinction which Louisiana seeks to draw is inappropriate for it does not address or refute the principle established by these cases, *i.e.,* that the intervention of non-state parties does not destroy the original jurisdiction of the Supreme Court. In these

cases, the Court allowed the intervention of non-state parties because it felt that to decline to do so would preclude these parties from ever being able to assert their interests if a final adjudication were made in the Supreme Court without their participation. Thus, the results of these cases apply fully to the instant case, where the subject matter of the controversy between the pipelines and Louisiana is the same as that between the plaintiff states and Louisiana, and the Court's disposition of the plaintiff States-Louisiana controversy would, in large measure, also be dispositive of the pipelines-Louisiana controversy. See, also, *Utah v. United States*, 394 U.S. 89 (1969).[9]

Nor is Louisiana's position (Br., p. 39) helped by its reliance upon *California* v. *Southern Pacific Co.*, 157 U.S. 209 (1895). In that case, the parties seeking to intervene as defendants were citizens of the plaintiff state, and thus the controversy was characterized as ones between a state and its own citizens. The Court held that such a suit was not within its original Supreme Court jurisdiction over "all cases. . . in which a State shall be Party," U.S. Const. art. 3, § 2, cl. 2, is limited by the constitutional grant of federal jurisdiction generally. Analyzed in terms of the identity of the parties as opposed to the subject matter, the judicial

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[9]While the Court in *Utah* denied intervention to a non-state party, it was on the limited ground that the issues had been so limited by stipulation that the Court's decision would have no impact on the private party. However, as the Master noted (Rep., p. 8), the Court went on to observe that absent the stipulation "Morton's right to intervene would have had a substantial basis . . . it would have been fairest to permit Morton to speak for itself." 394 U.S. at 92.

power of the United States extends only to controversies between two or more states, controversies between a state and citizens of *another* state, and controversies between a state and foreign states, citizens or subjects. U.S. Const. art. 3, § 2, cl. 3. Accordingly, the Court held that a controversy between a state and its own citizens is not within its original jurisdiction.

Significantly, the Court recognized that a controversy between a state and citizens of *another* state would be within its jurisdiction. Unlike the situation in *Southern Pacific,* the controversy between Louisiana and the pipelines both comes within federal court jurisdiction generally and is a case in which a state is a party. Therefore, the Supreme Court has original jurisdiction of the controversy.[10]

In sum, while satisfaction of the requirements set out in Article III is a prerequisite to original jurisdiction in the Court, once these requirements have been satisfied as they are here, there is nothing in Article III mandating additional jurisdictional limitations precluding the joinder of non-state parties. See, *United States v. West Virginia,* 295 U.S. 463, 470-471 (1935) (holding that the Court's original jurisdiction embraces a suit where the United States is plaintiff, a state is defendant, and private parties are co-defendants).

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[10]*New Mexico v. Lane,* 243 U.S. 52, 57-58 (1917) and *Texas v. I.C.C.,* 258 U.S. 158, 164 (1927) also cited by Louisiana (Br., p. 39) similarly do not help Louisiana. The statements apparently relied on by Louisiana are conclusory, without any supportive analysis and, in any case, were made as part of an alternative secondary ground.

D. The Eleventh Amendment Does Not Bar Intervention By The Pipelines

Louisiana (Br., pp. 40-41) contends further that the intervention by the pipelines is barred by the Eleventh Amendment. But this argument is based on Louisiana's erroneous postulation (Br., p. 41) that the plaintiff States are "posing as surrogates" for the pipelines (but see *supra*, pp. 5-6). In addition, it overlooks the fact that the pipelines' complaint does not seek an order from the Court directing Louisiana to refund the taxes paid (see Br., pp. 40-41). Rather, the pipeline's complaint seeks only a declaration that the Tax is unconstitutional. Such a declaration clearly does not run afoul of the prohibitions of the Eleventh Amendment.

Louisiana (Br., p. 41) argues that "[t]he whole purpose of the Eleventh Amendment was to protect States like Louisiana from being forced to respond in this Court, or any other federal court, to tax refund claims asserted by citizens of other States." A more precise statement of the law is that "[o]ne of the primary purposes of the Eleventh Amendment is the protection of the states' fiscal integrity," *Huecker* v. *Milburn*, 538 F.2d 1241, 1243 (6th Cir. 1976); see also *Edelman* v. *Jordan*, 415 U.S. 651 (1974). In view of the facts that the First Use Tax payments were made under protest, must be and are being held in escrow, and thus cannot be put to use, or even placed in its treasury, by Louisiana, any decision declaring the Tax to be unconstitutional would have no effect on Louisiana's fiscal integrity.

Moreover, inasmuch as the Eleventh Amendment does not apply to the case brought by the plaintiff States against Louisiana, so that "Louisiana is already a party to

a proceeding in which the validity of its tax is under attack" (Rep., p. 8), there is no good reason for invoking that Amendment to bar *intervention* by the pipelines. As the Special Master points out (Rep., p. 8), intervention differs materially from the institution of original suits. As he also found, not only would participation of the pipelines as parties "not complicate the trial of the case, delay it or prejudice the rights of the original parties" (Rep., p. 7), but also it would not affect the relief ultimately granted (Rep., p. 8). Consequently, the considerations underlying the Eleventh Amendment are plainly inapplicable.[11]

Additionally, even if the Eleventh Amendment might otherwise be applicable, it is apparent in light of the sweeping waiver on tax matters contained in La. R.S. 47:1576,[12] that Louisiana has waived whatever immunity it might have had to the pipelines' participation in the instant suit.[13] Thus Section 1576B provides "a legal remedy and right of action in *any* state or *federal court* having jurisdiction of the parties and subject matter, for

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[11]Cf. *United States v. State Tax Comm'n*, 481 F.2d 963, 975 (1st Cir. 1973); *United States v. Arlington County*, 326 F.2d 929, 932-933 (4th Cir. 1964); *United States v. State Board of Equalization*, 450 F. Supp. 1030, 1032 (N.D. Cal. 1978).

[12]The Court of Appeals for the Fifth Circuit has consistently recognized Section 1576 as constituting a valid waiver of Louisiana's Eleventh Amendment immunity. See, e.g., *Mississippi River Fuel Corp. v. Cocreham*, 382 F.2d 929 (5th Cir. 1967), *cert. den.*, 390 U.S. 1014 (1968); *Shell Oil Company v. Mouton*, 410 F.2d 715, 716 (5th Cir. 1969).

[13]The Special Master did not deal with this matter since he was of the view that granting the pipelines intervention "is appropriate apart from any waier of immunity" (Rep., p.8, fn. 1).

a full and complete adjudication of any and all questions . . . as to legality of any tax accrued or accruing, or the method of enforcement thereof."[14] In addition to repeating the critical language providing for "a legal remedy in the state or federal courts," Section 1576C goes on specifically to include within the waiver cases in which the "taxes are claimed to be an unlawful burden upon interstate commerce . . . in violation of any Act of Congress or the United States Constitution," as well as "cases where jurisdiction is vested in any of the courts of the United States."[15]

The latter two provisions alone — and particularly when read in conjunction with the general waiver provided in Section 1576 — clearly evidence Lousiana's willingness to waive whatever immunity it might otherwise have had and to permit taxpayers such as the pipelines to participate in proceedings such as those here involved. See, e.g., *Great Northern Life Insurance Co.* v. *Read,* 322 U.S. 47, 54 (1944); *Kennecott Copper Corp. v. State Tax Comm'n,* 327 U.S. 573, 577 (1946); *J. Reagan v. Farmers' Loan & Trust Co.,* 154 U.S. 362 (1894); *Soni v. Board of Trustees,* 513 F.2d 347, 352-53 (6th Cir.1975) *cert. den.,* 426 U.S. 919 (1976).

E. The Pendency Of The Pipelines' Refund Suit in State Court is No Bar To Their Intervention In This Case

The fact that the pipeline companies are also pursuing their claims in certain state court proceedings

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[14]Emphasis supplied.

[15]The full text of La. R.S. 47:1576 is set out in the Appendix, *infra,* pp. 17-18.

pending in Louisiana does not detract from their intervening in this case.

Those proceedings, -- the first instituted by the Governor and other Lousiana officials against the pipeline companies and others, seeking a declaratory judgment that the tax does not run afoul of the federal Constitution, and the second brought by the pipelines under Louisiana's statutory payment-under-protest procedure (R.S. La. 47:1576) seeking refund of the taxes paid under protest -- will be controlled as a practical matter by the ultimate decision of this Court. Clearly, and despite Louisiana's attempted denial (Br., p. 42), the pipelines had little choice as to their participation as litigants in both of those cases: just as they were required to respond to the Governor's declaratory action suit, they were likewise required to sue for refund pursuant to the statutory scheme under pain of forfeiting all taxes paid under protest.

In the case now before the Court, the pipelines seek to avail themselves of the opportunity to intervene in a proceeding, properly brought by other parties, in which this Court is called upon to make the ultimate disposition with respect to the validity of the Tax, and which provides a single, superior vehicle for the resolution of all disputes concerning all parties. The pipelines' intervention in this action not only will avoid protracted and duplicative litigation in the Louisiana courts, but would also ensure protection and assertion of the pipelines' distinct interests in the very suit which will ultimately decide the constitutional question affecting those interests.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should overrule Louisiana's exceptions to the intervention of the pipelines and adopt the recommendations thereon set out in the Report of the Special Master dated May 14, 1980.

Respectfully submitted,

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APPENDIX

§ 1576. Remittance of tax under protests; remedy at law for recovery and interest on amount recovered

A. A right of action is hereby created to afford a remedy at law for any person aggrieved by the prohibition of courts restraining the collection of tax, penalty, interest, or other charges imposed in this Subtitle. The person resisting the payment of any amount found due by the collector, or of enforcement of any provisions of this Subtitle, shall remit the amount found due to the collector and at that time shall give the collector notice of his intention to file suit for the recovery thereof. Upon receipt of this notice, the amount remitted shall be placed in an escrow account and held by the collector or his duly authorized representatives for a period of thirty days. If suit is filed within the thirty-day period for the recovery of such amount, the funds in the excrow account shall be further held pending the outcome of the suit. If the person prevails, the collector shall refund the amount to the claimant, with interest at the rate of six percent per annum covering the period from the date the funds were received by the collector to the date of refund.

B. This Section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter, for a full and complete adjudication of any and all questions arising in the enforcement of this Subtitle as to the

legality of any tax accrued or accruing or the method of enforcement thereof. In such action, service of process upon the collector shall be sufficient service, and he shall be the sole necessary and proper party defendant in any such suit.

C. This Section shall be construed to provide a legal remedy in the state or federal courts, by action of law, in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress or the United States Constitution, or the Constitution of the state of Louisiana, or in any case where jurisdiction is vested in any of the courts of the United States.

D. Upon request of a person and proper showing by such person that the principle of law involved in an additional assessment is already pending before the courts for judicial determination, such person, upon agreement to abide by the decision of the courts, may remit the additional assessment under protest, but need not file and additional suit. In such cases the tax so paid under protest shall be placed in an escrow account and held by the collector until the question of law involved has been determined by the courts and shall then be disposed of as therein provided.
Amended by Acts 1975, No. 458, §1.

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 83, Original

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF MARYLAND, ET AL., PLAINTIFFS

v.

STATE OF LOUISIANA

REPLY OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION TO EXCEPTIONS OF THE STATE OF LOUISIANA TO THE REPORT OF THE SPECIAL MASTER, DATED MAY 14, 1980

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 83, Original

STATE OF MARYLAND, ET AL., PLAINTIFFS

v.

STATE OF LOUISIANA

REPLY OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION TO EXCEPTIONS OF THE STATE OF LOUISIANA TO THE REPORT OF THE SPECIAL MASTER, DATED MAY 14, 1980

In our brief *amici curiae* of June 1979 in support of the plaintiffs' motion for leave to file a complaint and our brief *amici curiae* of November 1979 in support of plaintiffs' motion for judgment on the pleadings, we advised the Court that both the United States and the Federal Energy Regulatory Commission have a substantial and immediate interest in this litigation involving the Louisiana First Use Tax on natural gas.

As a consumer of natural gas in the operation of military and civilian installations, the United States is directly affected by the additional costs imposed by the First Use Tax. The United States is also the lessor under leases authorizing various persons to produce natural gas from federal enclaves and the Outer Continental Shelf, over which it has exclusive jurisdiction. If the federal government's lessees are compelled to pay the First Use Tax, the revenues received by the United States from

these leases could be significantly reduced. Finally, the Louisiana First Use Tax conflicts with the federal regulation of the sale and transportation of natural gas in interstate commerce. The impact of the Louisiana tax is to increase the price of gas extracted from federally-leased areas.

ARGUMENT

1. The Special Master correctly recommended that the Court grant the motion of the United States and the Federal Energy Regulatory Commission to intervene as plaintiffs. As he noted in his report (page 5), while the interest of the United States and the Commission is somewhat different from that of the original plaintiffs, "from the point of view of completing the litigation with the participation of all parties which have a direct and important interest in it, it is not only appropriate, but highly desirable that the United States be joined as a party." In support of his recommendation, the Special Master cited the fact that the United States is not only a consumer of natural gas but has a separate interest because of its responsibilities under the Outer Continental Shelf Lands Act, 43 U.S.C. 1331-1343. Moreover, since the plaintiffs rely upon actions of the United States and the Commission for their claims as to the unconstitutionality of the Louisiana First Use Tax, Fed. R. Civ. P. 24(b) supports the federal intervention. See also *Wisconsin* v. *Illinois*, 278 U.S. 367 (1929); *Arizona* v. *California*, 344 U.S. 919 (1953); *Oklahoma* v. *Texas*, 253 U.S. 465 (1920); *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953).[1]

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[1]Louisiana seeks to distinguish (Br. 36) *Wisconsin* v. *Illinois*, *supra*, and *New Jersey* v. *New York*, *supra*, on the ground that "the United States at no time appeared as an intervenor." But the United States was an active participant in subsequent proceedings in the former case for many years, first as an *amicus curiae* (*e.g.*, 352 U.S. 983, 984 (1957); 359 U.S. 963 (1959); 360 U.S. 712, 713, 714 (1959)), later as an

2. Louisiana argues that neither the United States nor the Federal Energy Regulatory Commission should be permitted to intervene as parties in this case and that the Special Master erred in so recommending. In support of its position, Louisiana claims that: (a) the United States did not allege that the injuries for which it seeks redress were directly caused by Louisiana (Br. 29); (b) that, even as a consumer of natural gas, the United States has no cause of action against Louisiana for increased costs of gas because the tax is imposed upon the producer and transporter of the gas and simply "passed on" to the United States (Br. 29); and (c) that the Federal Energy Regulatory Commission, and not Louisiana, is responsible for the pipelines' passing on of the additional cost represented by the tax to consumers such as the United States (Br. 31). Moreover, Louisiana disputes (Br. 31) the government's claim that the United States is directly affected by the tax in its capacity as a lessor under leases authorizing production of natural gas from federal enclaves and the Outer Continental Shelf over which it

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intervenor (361 U.S. 956 (1960)), and we contributed to the formulation of the proposed decree that the Court entered on June 12, 1967. 388 U.S. 426. The potentially affected interests of the United States included navigation in the Great Lakes, the St. Lawrence Seaway and the Illinois Waterway, hydroelectric power development on the Niagara and St. Lawrence Rivers, pollution and other threats to public health in and around the Great Lakes, the national interest in the Great Lakes-St. Lawrence system as a unique natural resource, and finally, the maintenance of friendly relations with Canada.

Moreover, while the United States did not intervene in *New Jersey* v. *New York*, *supra*, the Special Master's (and our) citation of that case is to the portion of this Court's opinion denying a motion by the City of Philadelphia to intervene because its interests were adequately represented by Pennsylvania. Here, by contrast while the United States supports the plaintiff States, its concerns and interests are different.

has exclusive jurisdiction. Finally, Louisiana contests (Br. 33-35) the proposed intervention of the Federal Energy Regulatory Commission on the ground that there is no conflict between the First Use Tax and the federal regulation of the sale and transportation of natural gas in interstate commerce.

a. The most cursory examination of the Complaint in Intervention establishes that the United States has alleged "injur[ies] that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976); *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 72, 74 (1978). Specifically, the United States alleges that it "is a consumer of natural gas in the operation of military and civilian installations and is thereby directly affected by the additional costs imposed by the Louisiana First Use Tax[,]" and that, as the lessor under leases authorizing various persons to produce natural gas from federal enclaves and the Outer Continental Shelf, it may suffer a significant reduction in revenues from those leases if its lessees must bear the First Use Tax.[2] Complaint in Intervention, paras. VI-VII.

Plainly, a decision by this Court will "redress the claimed injuries." *Duke Power Co.* v. *Carolina Environmental Study Group*, *supra*, 438 U.S. at 74. If, as we submit, the Court holds that the First Use Tax is unconstitutional, the United States will not incur additional operating costs and a potential loss of revenues. If the tax is upheld, however, then the United

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[2] The government is not required to await the actual loss of revenues before seeking relief. It is sufficient that the injury is impending. *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 593 (1923).

States will suffer the burden of these additional costs and reduction in revenues.

b. Moreover, it is immaterial that the First Use Tax is not imposed directly upon the United States. For present purposes, it is sufficient that the First Use Tax triggers a chain of events that results in the imposition of additional costs upon the United States. That fact gives the United States standing to pursue a cause of action against Louisiana involving "a matter of grave public concern in which the [plaintiff States and the federal government], as the representative[s] of the public, h[ave] an interest apart from that of the individuals affected. It is not merely a remote or ethical interest but one which is immediate and recognized by law" *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 592 (1923). See also *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339-344 (1979).

c. At all events, even if it were necessary that the First Use Tax be imposed upon the United States, it is plain that the Act requires that the tax will not be absorbed by the pipelines but will be passed on to the ultimate consumers. Section 47:1303C of the First Use Tax Act, La. Rev. Stat. Ann. (West Supp. 1980), abrogates "agreement[s] or contract[s] by which an owner of natural gas at the time a taxable use first occurs claims a right to reimbursement or refund of such taxes from any other party in interest, other than a purchaser of such natural gas * * * on the basis that this tax constitutes a cost incurred by such owner by virtue of the separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, or * * * any other grounds for reimbursement or refund[.]" In its answer, Louisiana admits that Section 47:1303C requires that the First Use Tax be passed along to natural gas consumers. It states that "the sole purpose, intent, and application of [Section 47:1303C is] to ensure that the First Use Tax will not

unreasonably burden any person within the interstate commerce stream but will be passed along to the ultimate users and consumers." Answer, para. LX, at 21. "There can be no doubt from the clear wording of the statute that the [Louisiana] Legislature intended that this [First Use] tax be passed on to the purchaser." *First Agricultural Nat. Bank* v. *Tax Comm'n*, 392 U.S. 339, 348 (1968). See also *United States* v. *Mississippi Tax Comm'n*, 421 U.S. 599, 607-609 (1975); *Diamond National Corp.* v. *State Board of Equalization*, 425 U.S. 268 (1976); *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 97, 99 (1941); *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110 (1954); *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941).

The fact that the Act requires that the First Use Tax be passed on to the ultimate consumer is further supported by the authoritative legislative history, which takes the form of statements made during the hearings before the Louisiana legislature. Representative Tauzin, the sponsor of the First Use Tax, and others stated that the effective date of the tax had been deferred to give the pipelines time to reflect the tax in their rates,[3] that the pipelines would not bear the tax because they could pass it along to their customers,[4] that the tax had been structured to require that it be passed along to the ultimate consumers not to the gas producers,[5] and that gas consumers in

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[3] *Hearings on H.B. 768 Before the Revenue and Fiscal Affairs Comm. of the Louisiana Senate* 4, 5-6, 12-13 (June 26, 1978) (Rep. Tauzin) (hereinafter "*Senate Hearings*"); *Hearings on H.B. 768 Before the Comm. on Ways and Means of the Louisiana House of Representatives* 2 (June 6, 1978) (Rep. Tauzin) (hereinafter "*House Hearings of June 6, 1978*").

[4] *Senate Hearings*, 4, 5-6, 26-27 (Rep. Tauzin); *id.* at 19 (Mr. Garner); *House Hearings of June 6, 1978*, 3 (Rep. Tauzin).

[5] *Senate Hearings*, 3-5 (Rep. Tauzin); *Hearings on H.B. 768 Before the Comm. on Ways and Means of the Louisiana House of Representatives* 13 (June 5, 1978) (Rep. Tauzin) (hereinafter "*House Hearings of June 5, 1978*).

Louisiana are protected from any impact resulting from the tax.[6] These remarks reinforce the explicit language of Section 47:1303C and confirm our submission that Louisiana has enacted an elaborate taxing scheme which is designed to ensure that the tax will be borne solely by consumers in other states. There is accordingly no basis to Louisiana's claim that the tax is not borne by the United States in its capacity as a consumer of natural gas and as a lessor of production areas in federal enclaves.

d. Given the plainly-stated prohibition of Section 47:1303C against the owner of the gas passing on the cost of the First Use Tax to the producer, Louisiana blinks at the realities of gas regulation and economics in contending that the imposition of the tax on the ultimate consumer is a consequence of the voluntary actions of either the pipelines or the Commission.

As regulated utilities, the pipelines are entitled to recover in their rates prudently incurred costs including taxes for "no public utility [can] be compelled to absorb its own costs and not pass them on to the consumer." *Public Service Commission of New York* v. *Federal Power Commission*, 467 F. 2d 361, 370 (D.C. Cir. 1972); *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Galveston Electric Co.* v. *Galveston*, 258 U.S. 388, 399 (1922); *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 163 F. 2d 433, 437, 451 (D.C. Cir. 1947). Since the Louisiana tax at issue amounts to approximately $225 million per year, the prohibition against passing on the tax back to the producers virtually requires the pipelines to pass it on to the consumers.

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[6]*Senate Hearings*, 3-5, 13 (Rep. Tauzin); *House Hearings of June 5, 1978*, 4 (Rep. Tauzin), 5 (Rep. Bagart and Rep. Guidry), 6 (Rep. Laborde), 8 (Rep. Bruneau); *House Hearings of June 6, 1978*, 10, 17 (Mr. Brooksher), 37 (Mr. Steimel), 40 (Rep. Leach).

There was nothing voluntary about such action. The pipelines cannot remain in business if they are required ultimately to absorb this massive cost.

e. Finally, Louisiana contests the proposed intervention of the Federal Energy Regulatory Commission. But the conflict between Section 47:1303C of the First Use Tax Act and the Commission's exclusive regulatory jurisdiction over the transportation and sale of natural gas in interstate commerce could not be more palpable. The Commission has consistently held that a pipeline's natural gas customers do not receive any benefits from the pipelines transportation of liquid and liquefiable hydrocarbons for the owners, and that the costs associated with the transportation and delivery of such products at the inlet of a processing plant must be borne by the producers, who benefit from such activities, and not by the natural gas consumers.[7] However, Section 47:1303C seeks to preclude the Commission from classifying the First Use Tax as a cost associated with the extraction of hydrocarbons. It does this by prohibiting the pipelines from obtaining reimbursement from the owner of the extracted hydrocarbons and requiring the pipeline to seek reimbursement, if at all, from subsequent purchasers, *i.e.*, consumers, of the natural gas.

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[7] *Union Oil Company of California, et al.*, Docket No. C177-828, *et al.*, order at 7, 10-11 (Apr. 12, 1978); *Canadian Superior Oil (U.S.) Ltd., et al.*, Docket No. C177-802 (Mar. 28, 1978); *High Island Offshore System*, Docket Nos. CP75-104, *et al.*, order at 10, 16-17, 18 (June 4, 1976); *Tennessee Gas Pipeline Co. et al.*, 38 F.P.C. 691, 698 (1967); *Northern Natural Gas Co.*, 28 F.P.C. 1155, 1163-1165 (1962), aff'd *sub nom. Mid-America Pipeline Co.* v. *FPC*, 330 F. 2d 226 (D.C. Cir. 1964); *Continental Oil Co., et al.*, 27 F.P.C. 96, 107-108 (1962); *Texas Eastern Transmission Corporation*, 11 F.P.C. 435, 447 (1952). See also *Pipeline Costs Allocable To The Transportation Of Liquids, Liquefiable Hydrocarbons, etc., For Others*, 47 F.P.C. 208 (1972), rev'd on other grounds *sub nom. Mobil Oil Corp.* v. *FPC*, 483 F. 2d 1238 (D.C. Cir. 1973).

The conflict between the Louisiana tax and the Commission's authority is therefore not an abstraction. To the contrary, the First Use Tax trenches upon "matters which directly affect the ability of the [Commission] to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which [is] an objective of the Natural Gas Act [and the Natural Gas Policy Act]." *Northern Natural Gas Co.* v. *Kansas Commission*, 372 U.S. 84, 91-92 (1963). In these circumstances, the Commission's "right to intervene [has] a substantial basis * * *, [and] it would seem fairest to permit [it] to speak for itself." *Utah* v. *United States,* 394 U.S. 89, 92 (1969). See also Fed. R. Civ. P. 24(b).

CONCLUSION

For the reasons stated above and in the Special Master's Report, the motion of the United States and the Federal Energy Regulatory Commission to intervene as plaintiffs should be granted.

Respectfully submitted.

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AUGUST 1980

DOJ-1980-08

No. 83, Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF MARYLAND, *et al.*,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

ON MOTIONS OF THE PLAINTIFFS FOR JUDGMENT ON THE PLEADINGS AND OF THE DEFENDANT FOR DISMISSAL OF THE COMPLAINT

REPORT OF THE SPECIAL MASTER

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September 15, 1980

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REPORT OF THE SPECIAL MASTER

This is the second preliminary report to be filed by the Special Master. The first, filed on May 14, 1980, contained the Special Master's recommendations with respect to various motions to intervene and to appear as *amicus curiae*. Those motions are still pending before the Court awaiting action on exceptions to the report. This

report will contain the Special Master's recommendations with respect to a motion by the plaintiffs for judgment on the pleadings filed on September 18, 1979,[1] and a motion by the defendant for dismissal of the complaint, filed on October 22, 1979.[2]

It seems to the Special Master more orderly to deal with the motion to dismiss first, since it is largely concerned with jurisdictional and prudential issues not directly involving the central theme of the complaint and can therefore be considered as preliminary to the issues on the merits raised by the motion for judgment on the pleadings.

FACTS

This case involves the constitutionality of Louisiana's "first use" tax on natural gas. La. Rev. St. 47:1301-1307. Effective April 1, 1979, that law imposes a tax of seven cents per thousand cubic feet of natural gas on the first use within Louisiana of natural gas which is not

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[1]Those pipelines which filed motions to intervene have also moved for leave to file a motion for judgment on the pleadings. Since the motion to intervene has not been acted on by the Court, this report will not address the pipelines' motion, but will be limited to the motion of the plaintiffs. However, it may be noted that the positions of the plaintiffs and of the pipelines are entirely consistent. Also it should be noted that the United States and the Federal Energy Regulatory Commission (F.E.R.C.—both hereafter referred to as the United States) have filed a brief *amici curiae* supporting the motion of the plaintiffs for judgment on the pleadings.

[2]Although this motion has not been specifically referred to the Special Master for a recommendation, the Special Master believes that the direction to him to "submit such reports as he may deem appropriate" is sufficient authority to justify a report on the motion. Order of March 3, 1980.

subject to State severance taxes imposed by Louisiana or by any other State, or to import duties imposed by the United States. In practical effect, all parties agree that the tax is in fact imposed on the first use within Louisiana of natural gas produced from the submerged lands of the outer continental shelf[3] outside Louisiana and from federal enclaves within Louisiana.[4]

The Louisiana statute states that its purpose is to compensate its citizens "for costs incurred and paid with public funds, which costs enure solely to the benefit of the owners of natural gas produced beyond the boundaries of Louisiana" and to recover for "damages to the state's waterbottoms, barrier reefs, and sensitive

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[3]The outer continental shelf consists of submerged lands seaward of the three-mile coastal belt ceded to Louisiana in 1953 by the Submerged Lands Act (43 U.S.C. 1301-15) as interpreted and applied to Louisiana by the opinion of this Court in *United States v. Louisiana*, 363 U.S. 1 (1960). By the Outer Continental Shelf Lands Act (43 U.S.C. 1331-43) Congress retained for the United States all rights of exploration, development and production from the outer continental shelf. The coastal States are specifically excluded from imposing their tax laws on the outer continental shelf.

[4]Nothing developed in the case to date indicates how much gas is produced on federal enclaves. A brief filed by the United States on November 20, 1979, indicates that some gas is produced from the Barksdale Air Force Base, but no figures on amount are provided. There may be a legal distinction between the application of the Louisiana law to gas from enclaves as against gas from the outer continental shelf since the latter production is outside the boundaries of Louisiana and therefore crosses that boundary when it is brought into the State without regard to its ultimate destination. For purposes of the application of the Natural Gas Policy Act of 1978, gas produced on the outer continental shelf is deemed "committed or dedicated to interstate commerce." 15 U.S.C. 3301(18)(A)(i). None of the parties have attributed any significance to this variance in the source of the gas.

shorelands as a direct consequence of activity within the state associated with such natural gas by the owners thereof."[5] La. Rev. St. 47:1301C.

Under the Louisiana law, the tax is imposed on the owner of natural gas at the time it is first subjected to a "use" within the State. La. Rev. St. 47:1303. The term "use" is defined as

> "the sale; the transportation in the state to the point of delivery at the inlet of any processing plant; the transportation in the state of unprocessed gas to the point of delivery at the inlet of any measurement or storage facility; transfer of possession or relinquishment of control at a delivery point in the state; processing for the extraction of liquefiable component products or waste materials; use in manufacturing; treatment; or other ascertainable action at a point within the state." La. Rev. St. 47:1302(8).

In practical effect, this case involves for the most part the application of Louisiana's tax to natural gas produced from the outer continental shelf.[6] In a proffer of proof

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[5]In its opposition to the plaintiff's motion to file the complaint, Louisiana cites authorities who estimate that Louisiana is expending $40,000,000 a year for governmental services required for outer continental shelf development and is suffering erosion of its shoreline and barrier reefs of about sixteen square miles annually, 40% of which can be attributed to activities for the development and production of natural gas. The value of the lost land is estimated to amount to $300,000,000 yearly. (Louisiana Brief in Opposition to the motion for leave to file the complaint, p. 24.) In a proffer of proof filed with the Special Master on April 15, 1980, Louisiana recites in great detail the costs to it of services rendered and damages suffered by reason of the operations on the outer continental shelf, but gives no estimate of the dollar amount involved. Louisiana Proffer of Proof, pp. 61-90.

[6]In hearings before the Louisiana Senate Revenue and Fiscal Affairs Committee with respect to the bill which became the first

[footnote continued]

submitted by Louisiana on April 15, 1980, pursuant to the request of the Special Master, there is a description of the procedures involving this gas. It rises to the surface at a platform in the Gulf of Mexico. There it passes through a separator or dehydrator to remove salt water and some impurities. In most cases ownership of the gas passes at the wellhead to the pipeline company. With respect to about 15% of the gas, the producer retains title to the gas until it is brought to shore and the processing is complete. In either case the gas passes through a gathering system of underwater pipelines which lead to the shore and thereafter to processing plants[7] where liquid and liquefiable hydrocarbons and pollutants are removed by a process of compression and decompression, heating and cooling and being subjected to contact with chemicals and oils. Some 5% in volume of the gas is thus removed at the processing plant. At the completion of the processing the dry gas is delivered to pipelines and more than 98% of this gas moves on out of the state. The products removed in the processing, including butanes, propanes, and ethanes, are transported to chemical plants for use as feedstock and fuel. Ordinarily the ownership of these products remains with, or reverts to, the producer.

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use tax, one of the sponsors of the bill, Wilbert J. Tauzin, II, stated at page 3, "We are talking about natural gas brought into this state from outside our boundaries that is not taxed by some other jurisdiction. At the present time that practically means OCS federal gas. That gas is produced outside our three mile limit in federal waters. It is piped in to processing companies in Louisiana and then the dry gas is shipped out of the state."

[7]Louisiana states that there are 124 processing plants in Louisiana which process 95% of the outer continental shelf gas. A processing plant typically occupies about seventy-five acres of land and represents a present cost value of $40,000,000. La. Proffer of Proof, p. 11.

Throughout the process described above, the natural gas is under pressure, either from the well pressure or from compressors, and is in continuous movement throughout its journey. In *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157, 163 (1954), the Court noted that "the entire movement of the gas, from producing wells through the Phillips gasoline plant and into the Michigan-Wisconsin pipeline to consumers outside Texas, is a steady and continuous flow." And the Fifth Circuit in *Deep South Oil Co. v. Federal Power Commission,* 247 F.2d 882 (1957), *cert. den.,* 355 U.S. 930 (1958), stated at pp. 887-88:

> ". . . petitioner's own brief testifies eloquently to the continuous movement of the gas which it sells at the wellhead. Petitioner admits, as, of course it must, 'that there is a continuous flow of gas from the Deep South wells into the gathering system of Texas gas; that the mass of gas of which the Deep South gas becomes a part moves continuously through the gathering system into a processing plant; that the movement through the processing plant is continuous; that there is a continuous movement of natural gas from the outlet of the processing plant to both interstate and intrastate destinations. . . .'"

However, gas which would be subject to the tax is exempted if it is used in Louisiana for "the drilling for or production of oil, natural gas, sulphur, or in the processing of natural gas for liquids extraction within the state . . ." or is 'consumed in the manufacture of fertilizer and anhydrous ammonia within the state." La. Rev. St. 47:1303A. A separate law provides that an owner subject to the first use tax, who is also subject to a severance tax on other production of gas or oil within the state, may credit his payment of the first use tax against his severance tax liability. La. Rev. St.

47:647. Further tax credits may be claimed against any other Louisiana tax to the extent that electric or gas utility companies or direct purchasers from the pipelines have been subjected to increases in their costs attributable to the first use tax. La. Rev. St. 47:11.

The first use statute declares "as against public policy," and makes unenforceable, any contractual provision which would entitle an owner of gas subject to the tax to recover the amount of the tax from any person other than a purchaser. La. Rev. St. 47:1303C. Thus, the burden of the tax, when it is imposed on a pipeline as the owner, may not be passed back to the producer, but must be borne by the pipeline or passed down the line to those who take the gas from the pipeline. Under the statute the tax is considered a cost of preparation or marketing of the gas. La. Rev. St. 47:1303C. So important did the Louisiana legislature consider these provisions that it added another section providing that if it is finally adjudicated that a contract for such pass-back is enforceable then either all first use taxes previously paid and subject to the contract shall be refunded, or the entire statute shall be null and void. La. Rev. St. 47:1307 Sec. 4.[8]

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[8]The Federal Energy Regulatory Commission has authorized the pipelines to pass on to their customers the first use tax collected from them, subject to refund when and if the tax is adjudged to be illegal. *State of Louisiana First Use Tax in Pipeline Rate Cases*, Docket No. RM78-23, Order No. 10, 43 Fed. Reg. 45553 (1978); Order No. 10-A, 43 Fed. Reg. 60438 (1978); and Order No. 10-B, 44 Fed. Reg. 13460 (1979), petitions for review pending *sub nom. Tennessee Gas Pipeline Co., et al. v. Federal Energy Regulatory Commission*, No. 78-3816 (5th Cir.). On April 24, 1980, the Commission issued an additional order modifying in some respects the terms of the prior orders with respect to insuring refunds to consumers. Order No. 10-C. On the same date, the Commission issued a show cause order in the same docket case to

[footnote continued]

Estimates of the amount of tax to be collected under the act vary from $225,000,000 (Md. Complaint, ¶ XIV) to $275,000,000 (Pipeline Br., p. 15) annually. The amount actually collected during the first year of operation has not been established. Other indications of the importance of this case to the natural gas industry are provided in Louisiana's proffer of proof. It is stated that there are 13,500 wells on the outer continental shelf producing 4.1 trillion mcf per year. The pipelines used to bring the gas ashore comprise 9,650 miles. The natural gas produced constitutes 10% of the natural gas consumed in the United States. La. Proffer, pp. 6-8.

The plaintiffs in this action are Maryland, New York, Massachusetts, Rhode Island, Illinois, Indiana, Michigan and Wisconsin. The sole defendant is Louisiana. The plaintiffs filed their motion for leave to file the complaint on March 29, 1979. The complaint alleged unconstitutionality under the commerce clause, the supremacy clause, the duty on imports clause, impairment of the obligation of contracts and the equal protection clause of the Fourteenth Amendment. Only the interstate commerce and the supremacy arguments are involved in the present motions. The plaintiff States allege injury by reason of the additional cost of gas used by them and by reason of such additional costs incurred by their citizens. The amounts alleged are very large: Maryland, $4,000,000; New York, $29,000,000; Massachusetts, $8,000,000; Rhode Island, $370,000; Illinois, $33,000,000; Indiana, $9,000,000; Michigan, $30,000,000; Wisconsin, $10,000,000.

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resolve the question of whether persons other than natural gas consumers should bear the burden of the first use tax while the constitutionality of the law is litigated. Show Case Order in Docket No. RM78-23 (Phase II) issued April 24, 1980.

On May 29, 1979, the defendant, Louisiana, filed a brief in opposition to the motion for leave to file. The United States, seventeen pipelines, the American Gas Association, the State of Alabama, and Associated Gas Distributors all filed briefs supporting the plaintiffs. On June 18, 1979, the Court granted the motion for leave to file the complaint and gave the defendant sixty days to answer. On August 17, 979, Louisiana filed its answer generally denying the assertions of the complaint and asserting the validity of the tax. Thereafter, on September 18, 1979, the plaintiffs filed a motion for judgment on the pleadings. On October 22, 1979, Louisiana filed a motion to dismiss the complaint. The pipelines and the United States filed briefs *amici curiae* supporting the plaintiffs.

On March 3, 1980, the Court appointed the undersigned Special Master and referred the motion for judgment on the pleadings to him. The Special Master has held two open hearings on March 21, 1980, and June 19, 1980, at which the parties and the applicants for intervention participated, to consider the course of proceedings and to hear argument on the various motions. Also, the Special Master requested Louisiana, which had moved for an evidentiary hearing, to submit a proffer of proof covering the factual matters as to which it asserted evidence was necessary. Louisiana has filed an extensive proffer of proof to which the other participants have responded by memoranda asserting that no evidentiary hearing is necessary.

And so the matter stands.

I.

MOTION TO DISMISS THE COMPLAINT

The defendant presents three arguments for dismissal of the complaint: First, the States have no standing to attack the constitutionality of the tax since the tax is imposed on the owners at the time of the first use of the gas and the fact that those owners have passed the tax on in the form of higher prices does not give the States standing to sue either for their own increased costs or for the increased costs to their citizens; second, the case is not a proper one to invoke the original jurisdiction of the Court since it is really not a dispute between the plaintiffs and Louisiana but between the pipelines or gas consumers and Louisiana; and, third, the dispute can better be tried in some other court, preferably a Louisiana court where State questions of construction can be decided and where constitutional issues, if they survive, can be tried on a full record and then appealed, if necessary, to the Supreme Court. The motion to dismiss does not argue that the constitutionality of the Louisiana law can be upheld on the face of the pleadings.[9]

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[9]The grounds urged by the defendant for dismissal are substantially the same as the grounds on which the defendant opposed the plaintiffs' motion for leave to file their complaint. The plaintiffs therefore argue that the granting of their motion over the objections of the defendant amount to a rejection of the defendant's jurisdictional and prudential arguments. However, the Court's order did not explicate the reasons for the order and the defendant argues that it should be taken as postponing consideration of its objections, rather than rejecting them. It does not seem profitable to speculate on the reasons underlying a *per curiam* order. Since the issues are constitutional, the defendant is probably not foreclosed from renewing its argument in the form of a motion to dismiss whatever the basis for the order.

A. Standing of Plaintiffs To Challenge Tax

Louisiana is, of course, correct in its assertion that no tax is directly imposed by it on the plaintiff States. At no time are they called on to remit funds to Louisiana; they and their citizens pay the pipelines which are liable for the first use tax. At least theoretically the seven cents per thousand cubic feet of gas could be absorbed by the producers of the gas or the pipelines. However, by the terms of the Louisiana statute, the owners liable for the tax are not allowed to pass it back to the producers. La. Rev. St. 87:1303C. The pipelines are public utilities whose rates, and the prices paid by purchasers from them, are controlled by FERC. Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. 717c and 717d. Thus they are entitled to recover from their customers all of the legitimate costs of obtaining the gas, processing it, and transporting it.[10] The Louisiana statute specifically provides that "this tax shall be deemed a cost associated with uses made by the owner in preparation of [or] marketing of the natural gas. La. Rev. St. 87:1303C. Although the FERC had previously accepted contracts which required producers to assume the costs of transporting liquid hydrocarbons associated with natural gas and of processing the natural gas to recover liquid and

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[10] *See FPC v. United Gas Pipe Line Co.*, 386 U.S. 237, 243 (1967):

> "One of [the Commission's] statutory duties is to determine just and reasonable rates which will be sufficient to permit the company to recover its costs of service and a reasonable return on its investment. Cost of service is therefore a major focus of inquiry. Normally included as a cost of service is a proper allowance for taxes, including federal income taxes. The determination of this allowance, as a general proposition, is obviously within the jurisdiction of the Commission."

liquefiable hydrocarbons, FERC has now ordered that the amount of the Louisiana first use tax be handed on to customers, thus accepting for the time being Louisiana's treatment of the item as a cost of processing the gas for transportation.[11] Thus, both by reason of the Louisiana law and the orders of FERC, the ultimate cost of the tax is now borne by the plaintiffs and by consumers in the plaintiff States. Under these circumstances it is clear that, although the tax is collected from the pipelines, it is really a burden on consumers. The parties required to stand the cost of the tax should be accorded standing to contest its constitutionality.

In analagous situations this Court has held that a state has standing to sue when it and its citizens have been adversely affected by the actions of a sister state. *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923). In that case where West Virginia was attempting to restrict the flow of natural gas, this Court said at page 592:

> This interference gives rise to a matter of grave concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest, but one which is immediate and recognized by law.

In *Georgia v. Pennsylvania Railroad,* 324 U.S. 439, 447 (1945), an alleged conspiracy with respect to freight charges imposed on shippers was found to implicate the state sufficiently to sustain its standing to sue. In a more

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[11] *State of Louisiana First Use Tax in Pipeline Rate Cases,* Docket No. RM78-23. In issuing its order in this case the FERC challenged the constitutionality of the tax and required the pipelines to institute refund proceedings in the Louisiana courts and to make appropriate undertakings to insure refunds to their customers if the tax is thrown out.

recent case this Court held that, although ordinarily only direct purchasers may recover Clayton Act treble damages, cost-plus purchasers may be in a different posture. *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 736 (1977). In these cases the Court looks beyond forms to the substance of the claim. *Arkansas v. Texas,* 346 U.S. 368, 371 (1953).

It would be unfortunate if the parties who actually stand the loss were required to rely on an intermediary who had passed on the loss to them to press the claim of unconstitutionality. In this case the pipelines are in agreement with the plaintiffs, but their interest is different and the states would be allowed to speak for themselves. I conclude they have standing to sue.

B. Jurisdiction as an Original Action

The original jurisdiction of this Court, established by Article III, Sec. 2, Clauses 1 and 2 of the Constitution, and made exclusive by 28 U.S.C. 1251(a)(1), may not be invoked when the plaintiff State is really asserting a claim in behalf of individuals who are the real parties in interest. *Oklahoma v. A.T. & Santa Fe Ry.,* 220 U.S. 277 (1911); *Pennsylvania v. New Jersey,* 426 U.S. 660 (1976).[12]

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[12] In the latter case the Court said at 665-66:

> "It has, however, become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens.
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> * * *
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> "This rule is a salutary one. For if, by the simple expedient of bringing an action in the name of a State, the Court's original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievancies, our docket would be inundated. And, more important, the critical distinction, articulated in Art. III, Sec. 2, of the Constitution, between suits brought by 'Citizens' and those brought by 'States' would evaporate."

The defendant argues that in this case the plaintiffs are not the real parties in interest, but are volunteers for the pipelines, or for their own citizens. I have discussed the issue of standing with respect to the pipelines above and concluded that the fact that the cost of the tax is indirect rather than direct does not foreclose plaintiffs from asserting the injury to them and their citizens. With respect to the impact of the tax on consumers, the plaintiffs allege damage both in their proprietary status as users of natural gas in their various governmental functions and as *parens patriae*.

The plaintiff States allege that they have incurred material added costs as consumers of natural gas forced to pay higher prices by reason of the first use tax. The annual cost to each of the plaintiffs as alleged in the complaint is as follows: Maryland, $60,000 (¶ XVI); New York, $300,000 (¶ XXVI); Massachusetts, $25,000 (¶ XXII); Rhode Island, $25,000 (¶ XXVIII); Illinois, $270,000 (¶ XVIII); Indiana, $70,000 (¶ XX); Michigan, $650,000 (¶ XXIV); Wisconsin, $70,000 (¶ XXX). As far as these sums are involved, the States are not suing *parens patriae* or in any other representative capacity; they are suing to protect their own treasuries.

With respect to the injury done to the States by reason of the imposition of the additional costs on their citizens, the States do have a quasi-sovereign interest in their economic welfare. The individuals affected are not a selected group but practically the entire population. Perhaps some large consumers and the public utilities have individual claims of sufficient size to justify suits; but by and large it would seem difficult if not impossible for individual consumers to establish sufficient damage to themselves and a class suit would seem to be unmanageable. *Cf. Hawaii v. Standard Oil Co. of California,* 405

U.S. 251 (1972). The case seems to fall within the general class of cases in which the states have been recognized as proper parties. *See Pennsylvania v. West Virginia,* 262 U.S. 553 (1923) (restriction on shipment of oil); *Missouri v. Illinois,* 180 U.S. 208 (1901) (sewage in river); *Kansas v. Colorado,* 206 U.S. 46 (1907) (diversion of water); *New York v. New Jersey,* 256 U.S. 296 (1921) (pollution of harbor); *North Dakota v. Minnesota,* 263 U.S. 365 (1923) (altering flow of stream).

The Special Master concludes that the case falls within the original jurisdiction of the Court.

C. Court's Discretionary Authority To Restrict Use of Original Actions

Assuming that the plaintiffs have standing to sue and that the case falls within the original jurisdiction of the Court, the question still remains whether the Court should exercise its discretion over the use of original actions by dismissing the action.

It is clear, of course, that controversies between the States fall within the original jurisdiction of the Court under Article III, Section 2, Clauses 1 and 2 of the Constitution, which jurisdiction is exclusive by reason of 28 U.S.C. 1251(a)(1). The exclusivity of the jurisdiction suggests that in ordinary course the Court should accept such cases since the very grant of power to the court to the exclusion of other federal courts carries the implication that the Court will exercise its authority. But it is also clear that the Court can, and will, refuse to accept jurisdiction of a cause when there are other and better ways of resolving the dispute. *Arizona v. New Mexico,* 425 U.S. 794 (1976); *Massachusetts v. Missouri,* 308 U.S. 1, 18-19 (1939). In *Louisiana v. Texas,* 176 U.S. 1 (1900), the Court said at 15:

> But it is apparent that the jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter itself properly justiciable.

In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), the Court stated at pp. 93-94:

> It has long been this Court's philosophy that our original jurisdiction should be invoked sparingly. * * * We construe 28 U.S. 1251(a)(1) as we do Art. III, Sec. 2, Cl. 2 to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer.

The alternatives to the original suit here do not seem attractive as the means of deciding this controversy between the States. The defendant urges that the best forum to hear the case is the judicial system of Louisiana where the courts would have authority to construe the Louisiana statute and perhaps decide it on State grounds which would avoid the necessity of a constitutional adjudication.

There are at present two lines of cases in the State courts. First, the Governor and other officials of the State brought an action on September 22, 1978, against the pipelines and other owners subject to the tax. The case was filed in the Nineteenth Judicial District Court of Louisiana. The title of the case is *Edwards v. Trans-*

continental Gas Pipe Line Corp., Docket No. 216,867. The plaintiffs asked for a declaratory judgment on the constitutionality and construction of the first use statute. The defendants have filed answers raising the same arguments the plaintiffs present in this case. The case is presently in the discovery stage. The plaintiff States in this case are not parties to that proceeding, nor is the United States or FERC.

Second, the pipeline companies which have sought to intervene in this proceeding have filed a tax refund suit on June 22, 1979, in the Nineteenth Judicial District Court. *Southern Natural Gas Co. v. McNamara,* Docket No. 225,533. The defendants are the Secretary of the Department of Revenue and Taxation, the Department itself, and the State of Louisiana. The plaintiffs raise the same issues as are involved in the other State case and here. Again the plaintiff States here are not parties, nor is the United States or FERC. This case also is in the discovery stage.

Finally, the Federal Energy Regulatory Commission filed an action in the United States District Court for the Middle District of Louisiana on September 29, 1978, against the State officials. *Federal Energy Regulatory Commission v. McNamara,* C.A. 78-394. The plaintiffs sought to enjoin enforcement of the first use tax on the same grounds as are asserted in the other cases. On motion of the defendants the action was stayed on January 26, 1979. An appeal from the stay was filed in the Court of Appeals for the Fifth Circuit, but that appeal is presently stayed.

None of these cases appears to be a suitable substitute for the original action. In the State cases, the plaintiff States have no standing and the court apparently has no authority to grant injunctive relief pending the

outcome of the cases. The refunds, if ordered, appear to be limited as to interest to 6% which would result in a substantial advantage to the State and damage to the plaintiffs in view of the quarter of a billion dollars which is being collected annually. But, in any event, the plaintiffs should not be required to depend on private parties to conduct their litigation and protect their interests; they should be permitted to speak for themselves.

As for the United States District Court case, it is clear that the Constitution and Judicial Code give exclusive jurisdiction over the States' case against Louisiana to the Supreme Court so that the States cannot intervene. In view of the amounts involved, moreover, it would seem questionable to leave it to the United States to litigate, to invite the delays incident to a trial, to appeal to the Court of Appeals and then to an application for review here and eventually to consideration on the merits here. Of course cases can be expedited, but if the matter is to be tried in an evidentiary hearing of the type asserted to be necessary by the defendant, it will take time; if the evidentiary hearing is not required, it equally well can be decided here.

The strongest precedent in favor of dismissing the complaint and allowing the issues to be litigated in some other forum is *Arizona v. New Mexico,* 425 U.S. 794 (1976). That case involved an attempt by Arizona to institute an original action in this Court. Arizona was suing in its proprietary capacity as a consumer of electricity and as *parens patriae.* New Mexico had levied a tax on electric generation which fell on three companies that sold electricity in Arizona. Although the taxing statute appeared nondiscriminatory on its face, it was alleged that certain tax credits with respect to electricity sold in New Mexico resulted in the tax actually applying only

to electricity sold outside of the State. By the time the motion for leave to file came before the Court, suit had already been brought in the New Mexico courts by the three interstate electric companies attacking the constitutionality of the tax. One of the plaintiffs in that suit was related to Arizona so that the state could in effect represent itself in the New Mexico suit. This Court denied Arizona leave to file, holding in a *per curiam* decision that it was more appropriate to rely on the New Mexico proceeding.[13]

Both the plaintiffs (Brief in Support of Motion for Leave to File Complaint, pp. 14–18) and the United States (Brief *Amicus* on Motion for Leave to File Complaint, pp. 10–14) have drawn distinctions between that case and this. All the distinctions have merit, but the really significant difference is that, by reason of its relationship to one of the litigants, Arizona could be heard in its own behalf in the State court. The plaintiffs here cannot represent themselves in the State court proceedings described above. Also, in the Arizona case the issue was decided on the motion for leave to file. This Court has granted that motion in this case, permitting the filing, and to dismiss it now on grounds raised on consideration of the motion would be a far more serious reversal, penalizing the plaintiffs both in time and money.

The nature of this case seems to be appropriate for this Court's attention. It is important both because of

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[13]After the litigation in the State courts, on appeal this Court held the tax invalid. *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979). The Court held the tax invalid under the Supremacy Clause as inconsistent with a federal statute, 15 U.S.C. 391, prohibiting a state from imposing a tax on the generation or transmission of electricity that imposes a greater tax burden on electricity consumed outside of the taxing State than in it.

the huge sums involved and because of the number of States affected, thirty in all. The issues are important on their own account and because of their effect on the price of gas. The defendant asserts the case is not appropriate for original consideration by the Court because, it asserts, an extensive evidentiary hearing is necessary. Even if such a hearing proves to be necessary, the Court has adopted procedures for trying such cases.[14] An expeditious settlement of the controversy is desirable since the refund proceedings cannot make the plaintiffs whole and, while no great speed seems possible in a case of this magnitude and complexity, this Court can at least control the case and, if it desires, move it forward more speedily than would be possible in a trial and appeal procedure.

The Special Master recommends that the motion to dismiss the complaint be denied.

II.

MOTION FOR JUDGMENT ON THE PLEADINGS

The plaintiff States argue that on the basis of the complaint and answer they are entitled to judgment. While there are many facts in dispute, the plaintiffs assert that the Louisiana first use tax should be declared unconstitutional on the basis of facts that are not in dispute, on facts as to which the Court may take judicial notice, and on principles of law established by the Court. The tax act must fall, they say, because under the Supremacy Clause it is overruled by the Natural Gas

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[14] *See, e.g., Arizona v. California*, 373 U.S. 546 (1963), a case which took two years to try before a special master. Three hundred and forty witnesses were heard and the transcript consisted of 25,000 pages.

Act, the Natural Gas Policy Act of 1978 and the Outer Continental Shelf Act. In the second place, plaintiffs claim that, apart from its inconsistency with federal statutes, the act must fall because it encroaches on the exclusive interstate commerce field assigned to federal control. As to both claims it is argued that no evidentiary hearing is necessary or appropriate.

It is the Special Master's conclusion that the facts disclosed in the complaint and answer do not, without more, require that the act be invalidated on the basis of the Supremacy Clause. There are provisions of the federal and State laws which may be irreconcilable in operation; the Louisiana first use tax may in fact interfere with the federal regulatory process; but, on the other hand, the interference may be so indirect, so peripheral, so subject to administrative adjustments, as to permit the State and federal programs to coexist. Evidentiary hearings are necessary to reach a conclusion on these issues.

As far as the Interstate Commerce Clause is concerned, the Special Master believes that a determination on the validity of the Louisiana tax could be made on the pleadings, plus a generous application of judicial notice. But the Special Master also suggests that to reach a conclusion on the papers involves such an application of judgment that it would be desirable to withhold a conclusion until the issues can be tested against facts developed in an evidentiary hearing. To invalidate a State tax law is a serious limitation on the State's prerogative to manage its own fiscal affairs.[15] The Special Master believes that the chance of an erroneous decision can

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[15] *See Great Lakes Dredge and Dock Company v. Huffman*, 334 U.S. 385 (1949); *Matthews v. Rodgers*, 384 U.S. 521 (1932). The Congress has recognized this policy in 28 U.S.C. 1341, limiting the district courts' authority to issue injunctions in such cases.

be materially reduced by permitting the parties to present a factual record on the operation of the law rather than judicially noticing abstract scientific theories and engineering practices and then applying legal theories and findings from prior cases to situations not contemplated at the time they were pronounced.

A. Application of the Supremacy Clause

The Natural Gas Act (15 U.S.C. 717-717w) was enacted in 1938 to assure consumers of natural gas of fair prices and to protect them from the monopolistic power of the interstate pipelines in a field where the States were powerless to act. *See Federal Power Comm. v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944); *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 388-89 (1959). The Federal Power Commission (FPC), whose duties have been inherited by the Federal Energy Regulatory Commission (FERC), was given authority to regulate the interstate gas industry from the wellhead to the delivery of the gas to intrastate distributors or consumers. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954). Authority was given the Commission to regulate the prices of sales in interstate commerce for resale, to require certificates of convenience for the connection of pipelines, to approve contracts for the acquisition of gas, and fix the charges for transportation of gas. 15 U.S.C. 717c, 717d, 717f. Every aspect of the interstate natural gas business was entrusted to FPC regulation. Sec. 1(b) of the Act (15 U.S.C. 717(b)) provides:

> (b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to

> natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

The courts have interpreted the Act through the years in line with its purpose to grant the FPC, and now the FERC, full authority to implement the Act by rules, regulations or orders as domestic and international conditions have developed.

The Natural Gas Policy Act of 1978 (15 U.S.C. 3301) amended the Natural Gas Act in an attempt to undo the economic effect of fixing prices for interstate natural gas while leaving intrastate gas unregulated. This had resulted in a severe shortage of gas in the interstate market while producers sought to profit from the higher prices in the intrastate market. The 1978 act was an attempt to put all natural gas on an equal basis and thus to alleviate the shortage. In order to protect consumers of gas from the inclusion in the processing and transportation costs of expenses more properly allocable to the production and transportation of liquid and liquefiable hydrocarbons, FERC was given specific authority to allocate such costs between the products involved. 15 U.S.C. 3320.

The second federal statute involved is the Outer Continental Shelf Lands Act which was enacted in 1953. (43 U.S.C. 1331). This Act provides that the development of the resources of the submerged lands seaward of the boundaries of the coastal states be given to the federal government with authority over the exploration, leasing, and production of natural resources including oil and gas. The act specifically excludes the States from control over that area. 43 U.S.C. 1333.

The history of the dispute with Louisiana over its interest in the submerged lands goes back to 1950 when this Court determined that the U.S. had paramount rights in the submerged lands up to the shoreline. *United States v. Louisiana,* 339 U.S. 707. Congress, heedful of the States' claim that they had lost revenue from areas on which they had previously relied, ceded to the coastal States the submerged lands and their resources within their historic boundaries. *Submerged Lands Act,* 43 U.S.C. 1301 (1953). The validity of this cession was upheld in *Alabama v. Texas,* 347 U.S. 950 (1954), and the Louisiana boundary under the act was fixed at three miles in *United States v. Louisiana,* 361 U.S. 1 (1960).

Having given to the coastal States the submerged lands within their boundaries, the Congress then proceeded to make provision for the development of the remainder of the continental shelf seaward of the belt given to the States. In the committee hearings leading up to this statute, Louisiana and the other gulf States presented strong pleas that they be granted a share of the income from the parts of the shelf abutting their boundaries to compensate them for the expenses they foresaw devolving on them as a result of the offshore operations. Hearings before the Senate Committee on Interior and Insular Affairs on S. 1901, 83d Cong., 1st Sess. pp. 185-6, 187-8, 191-3, 265-6. In the end the Congress decided to give no share of the income from the outer continental shelf to the States and specifically wrote into the law a prohibition against any application of the States' tax laws to the area. S. Rep. No. 411, 83d Cong., 1st Sess., pp. 2-3, 13-14. 43 U.S.C. 1333(a)(2)(A) provides: ". . . State taxation laws shall not apply to the Outer Continental Shelf." And in 1933(a)(3): "The provisions of this section for adoption of State law as the law of the United States shall never be interpreted

as a basis for claiming any interest in, or jurisdiction on behalf of, any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom." Section 9 of the Act (43 U.S.C. 1338) provides that all revenues go into the federal treasury.[16]

The final federal statute involved is the Coastal Zone Management Act. 16 U.S.C. 1451. One of the provisions of this statute provides for a fund to make grants to the States to compensate them for the impact of the federal programs for energy development. 16 U.S.C. 1456a. This is one of the purposes declared by the Louisiana legislature in the first use tax as a justification for imposing the tax.

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[16]In a sense, the first use tax can be considered the most recent step in Louisiana's continuing effort to press its claim to profit from the production of oil and gas off its coast. The claim was first asserted in the initial dispute with the United States over title to all of the submerged lands, a dispute which was resolved in favor of the United States in *United States v. Louisiana*, 339 U.S. 707 (1950). The attempt in Congress to recover by legislation what had been lost in litigation was partially successful in that the Submerged Lands Act gave Louisiana the three mile belt along its coast. As pointed out in the text, Louisiana failed to convince Congress that it should share in the proceeds from the outer continental shelf. Louisiana continued to litigate as to the extent of its historic boundaries, which was finally fixed at three miles in *United States v. Louisiana*, 361 U.S. 1 (1960). Since that decision there has been extensive further litigation to fix the line and determine the disposition of royalties theretofore collected. *See, e.g., United States v. Louisiana*, 420 U.S. 529 (1975). The entire history of this litigation is described in an opinion of the Court issued last term. *United States v. Louisiana*, 100 S. Ct. 1618 (1980). The imposition of the first use tax, which is at precisely the same rate as the severance tax, is looked upon by the plaintiffs as one more step by Louisiana to recover some of the revenues it lost when it lost the submerged lands case.

Considering first the possible conflict with the Natural Gas Act, it is clear that Congress did not totally exclude the States from regulating some phases of the industry. This Court in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), recognized that, before the passage of the Natural Gas Act, the States had been held powerless under the Commerce Clause to protect themselves against abuses in the industry. *See, e.g., Missouri v. Kansas Gas Co.*, 265 U.S. 298 (1924). The Court in *Hope* noted at pp. 609-10 that the House report on the bill stated that its purpose was to fill the gap. In accomplishing that purpose the bill was designed to take "no authority from State Commissions" and was "so drawn as to complement and in no manner usurp State regulatory authority." H. Rep. 709, 75th Cong., 1st Sess p. 2. By the terms of the statute the federal government is given authority over interstate transportation, sales for resale in interstate commerce, and over gas companies engaged in such transportation or sale; while the States retain power to regulate local distribution and "the production or gathering of natural gas." 15 U.S.C. 717. Nothing is specified about State taxation, but the Natural Gas Policy Act of 1978 seems to recognize that the States may impose severance taxes on local production. 15 U.S.C. 3320(a)(1).

The plaintiffs highlight two aspects of federal regulation under the Natural Gas Act and the Natural Gas Policy Act which they assert override the provisions of the first use tax.

First, they assert that the federal authority to fix prices, the very "heart" of the Natural Gas Act (*Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 611 (1944)), is undercut by the Louisiana law, since the tax is added to the cost of the gas which is to

be sold in interstate commerce. Plaintiffs rely on such authority as *Northern Natural Gas Co. v. State Corporation Commission of Kansas,* 372 U.S. 84 (1963); and *Oklahoma Corporation Commission v. Federal Power Commission,* 415 U.S. 961 (1974). They may be right since the impact of the tax appears to be directed at interstate sales by reason of the exemptions and credits granted intrastate users. But a decision is hard to make on the pleadings since it is difficult to calculate how great an effect on the regulatory power of the FERC is imposed. We do know that the FERC has permitted, over its strong disinclination to do so, the first use tax to be treated as a cost of transportation and of processing and therefore included as one of the underlying factors on which the price to consumers is fixed. *State of Louisiana First Use Tax Rate Cases,* Docket No. R.M. 78-23 Orders No. 10, 10-A and 10-B, n.8, *supra.* The issue eventually to be resolved is whether the first use tax is just one of the many factors affecting the price, some of which are beyond FERC control, or whether it is a substantial hindrance to the Commission's powers.

Second, the plaintiffs press a more difficult problem resulting from the provisions of the Louisiana law which allot the tax to the cost of preparation [or] marketing of natural gas and outlaw contractual provisions passing the tax back to producers while permitting it to be added to the purchase price of consumers. La. Rev. St. 47:1303C. Basically this does not appear to be a fiscal matter since the revenue to the State is the same whoever eventually pays the bill. Louisiana in its Answer to the Complaint justifies the provision by stating that "the sole purpose, intent, and application of the [provision] has been to ensure that the First Use Tax will not unreasonably burden any person within the interstate commerce

stream but will be passed along to the ultimate users and consumers. Because the tax will be borne by the ultimate users and consumers, neither party to the contracts in question suffers." La. Answer, ¶ LX, p. 21. But FERC had previously accepted contracts that provided that the processing involved and the tax on it were properly considered costs of producing liquid and liquefiable hydrocarbons, not properly to be borne by consumers of the natural gas.

For the present, FERC has adopted regulations permitting the tax to be passed along, but making provision for refunds to the consumers if the tax is finally held invalid and mandating the pipelines to seek relief in the Louisiana courts. *State of Louisiana First Use Tax Rate Cases,* Docket No. R.M. 78-23. And FERC is itself seeking to upset the tax in the federal courts. *Federal Energy Regulatory Commission v. McNamara,* C.A. 78-394 M.D. La. Meanwhile the FERC administrative proceedings are continuing with an order to show cause why the producers should not be billed for and pay the First Use Tax with respect to liquid or liquefiable hydrocarbons transported with or extracted from natural gas. FERC Order to Show Cause in R.M. 78-23.

Thus FERC's final decision as to the allotment of the tax is still not made.

There is an ongoing dispute between the parties as to the legal effect of the processing by which the hydrocarbons are extracted and its effect on the natural gas. In part this turns on the physical nature of the process. If the natural gas is essentially the same when it goes into, and comes out of, the processing plant, and if the hydrocarbons are products which were retained by the producers from the start and are separated for their profit, then the position of the FERC is sound

that the cost, including the tax, should revert to the producers rather than being passed on to the customers. But if the processing is essentially a step to make the gas dry and of the Btu content standardized for transportation and use, then it is reasonable to pass the tax on to consumers. Plaintiffs claim that the authority to make that judgment is granted to FERC (*Federal Power Commission v. United Gas Pipe Line Co.*, 386 U.S. 237, 243-246 (1967)), and that Louisiana interferes with its function when it seeks to allot the tax. The Special Master believes that the conflict with the Natural Gas Act is the type of issue which cannot suitably be resolved on the papers or by reference to past decisions which were not really focused on the issue. Moreover, it may be that in the end FERC's orders can be adjusted so that the laws will mesh without conflict.

The alleged conflict between Louisiana's law and the Outer Continental Shelf Lands Act does not appear to require an evidentiary hearing. The argument appears to be that Louisiana is in effect imposing a tax on the production of gas produced in the federal domain, in spite of a specific prohibition against that action. 43 U.S.C. 1333(a)(2)(A). This is a legal question which can be answered by an analysis of the two statutes. It is true that the principle objects of the first use tax are actions with respect to, or transactions in, natural gas produced on the outer continental shelf. But no tax is imposed on any action or person until the gas has been brought into the state. To be sure, all, or almost all, of the gas produced does come into the State, and all, or almost all, of the gas that is brought into the State is subjected to one of the "uses" which results in liability for the tax. But that does not of itself answer the question since what happens in the State may subject it

to authority of the State. *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

The case which most strongly supports Louisiana's position is *Portland Pipeline Corp. v. Environmental Improvement Commission*, 307 A.2d 1 (Maine), *appeal dismissed*, 414 U.S. 1035 (1973). There, in order to provide funds to clean up oil spills, a tax was levied on the movement of oil over Maine's harbor waters. All, or almost all, of the oil taxed was, or had been, the subject of interstate or foreign commerce. Nevertheless, the court held that the tax was not on the oil itself but on the act of transporting it over Maine's waters. This case dealt not with a tax on gas but on oil, so that there was no question of the supremacy of the Natural Gas Act though a question could have been raised about the supremacy of the Water Quality Improvement Act of 1970. 33 U.S.C. 1321. What the case stands for is the continuing right in the States to protect their interests so long as their regulations do not hamper interstate commerce.

The most substantial possible conflicts appear to be between the Louisiana tax law and the Natural Gas Act, particularly the provisions with respect to passing the burden of the tax back to the producers or forward to the consumers. This may prove to be an irreconcilable conflict but, as this Court said in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 at 157 (1978):

> The Court's prior cases indicate that when a State's exercise of its police power is challenged under the Supremacy Clause, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act. *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218-23 (1947).

The decision whether to decide the issue on the pleadings, or to hold evidentiary hearings, is complicated by the fact that if hearings are held and the case prolonged, Louisiana stands to gain materially by continuing to collect a quarter of a billion dollars a year which, under its provisions for the refund of taxes paid under protest, would be repaid with only 6% interest, whereas the current value of this enormous fund would be far greater than 6%. It is desirable, therefore, to reduce the delay in deciding this case or to eliminate the profit to Louisiana from the delay.[17]

It does not appear to the Special Master that the desirability of expediting a decision outweighs the desirability of deciding the issues on the basis of a complete record. The Special Master recommends that the Court not grant the motion for judgment on the pleadings on the basis of the Supremacy Clause.

B. Interference with Interstate Commerce

We are concerned here with gas which is produced from the outer continental shelf, brought ashore by pipelines, processed in plants which remove pollutants and liquid and liquefiable hydrocarbons, delivered to interstate pipelines and transported out of the State. The whole movement is "steady and continuous flow." *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157, 163 (1954). And in *Deep South Oil Co. v. Federal Power Commission,* 247 F.2d 61 (5th Cir. 1957), it was

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[17]An interim injunction against the collection of the tax while its validity is being determined would eliminate this element of rewarding Louisiana for extending the litigation, but injunctions against the collection of State taxes are not favored.

recognized that "the mass of gas of which the Deep South gas became a part moves continuously through the gathering system into a processing plant; that the movement of natural gas from the outlet of the processing plant to both interstate and intrastate destinations." The courts have held that the natural gas is in interstate commerce during the entire journey. *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 369 (1965); *Interstate Natural Gas Co., Inc. v. Federal Power Comm.*, 331 U.S. 682, 684-7 (1947); *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464, 467 (1950).

The defendant asserts that the interstate transportation of natural gas commences at the tailgate of the processing plant and that the processing is a local activity that transforms "wet" gas into a different product, "dry" gas, so that the processing and the steps which precede it do not directly involve the interstate transportation. In view of the continuous movement of the gas, this seems a doubtful interpretation, but it hardly helps Louisiana in any event since the movement from the outer continental shelf across the state boundary and up to the processing plant would itself seem to be an interstate journey. *See Continental Oil Co. v. Federal Power Commission*, 370 F.2d 57, 66 (5th Cir. 1966). Moreover, the Natural Gas Policy Act of 1978 defines the term "committed or dedicated to interstate commerce" to include "(i) natural gas which is from the Outer Continental Shelf", 15 U.S.C. 3301(18). Thus, all of the uses preceding the processing would be part of a prior interstate transportation even if Louisiana were correct in asserting that the processing itself broke the chain. Moreover, even if the tax is considered to be imposed on a separable local event, it still will offend the interstate commerce clause if the result of the tax is to impair or hinder the interstate commerce. *Boston Stock*

Exchange v. State Tax Commission, 429 U.S. 318 (1977); *Halliburton Oil Well Co. v. Reily,* 373 U.S. 64 (1963).

Although it has been recognized that interstate commerce can be called on to meet its fair share of the State's costs, it has been held that in order to be valid a tax must be (1) "fairly apportioned; (2) "not discriminatory against interstate commerce"; (3) "applied to activity with a substantial nexus with the State"; and (4) "fairly related to service provided by the State." *Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734, 750 (1978). The plaintiffs claim that Louisiana's tax does not fall equally on both inter- and intrastate transactions, and that it is not fairly apportioned to an identifiable activity within the state.

Louisiana replies that its tax does not discriminate since a tax of seven cents per thousand cubic feet is imposed on all natural gas within the State, either as a severance tax with regard to gas produced within the State or as a use tax when the gas is produced outside the State and thereafter subjected to the specified uses within the State. But this equality is confused by a series of exclusions and credits. First, there is excluded gas used in drilling for or producing oil, natural gas, sulphur or in processing natural gas for liquids extraction, or in the manufacture of fertilizer and anhydrous ammonia, all within the State. La. Rev. St. 47:1303A. No exclusion is provided if these uses are made of the gas outside of the State. Secondly, a severance tax credit is allowed under which a taxpayer liable for the first use tax may, if he is also a producer of other gas within Louisiana, credit his first use tax payment dollar for

dollar against his liability for severance taxes.[18] Since there is no apparent relation between the ownership of outer continental shelf gas and the production of gas in Louisiana, it is hard to understand Louisiana's motive in permitting this credit, but it obviously aids an intrastate operation in a way not available to a pipeline engaged only in interstate transportation or producing gas outside of Louisiana. Finally, another credit for any increase in fuel costs by reason of the first use tax is allowed for use within the State by electric generating plants, gas distribution services, and direct purchasers from an interstate pipeline. This credit may be taken against any Louisiana tax or combination of taxes, other than severance taxes, owed to Louisiana, subject to a maximum credit of $2,000,000 and a minimum of $250. La. Rev. St. 47:11. Thus, Louisiana customers of local utilities and local consumers buying directly from the pipelines are protected in whole or in part from the incidence of the tax which is passed on to consumers out of the State.

The plaintiffs assert that these exclusions and credits all work to discriminate against the out-of-state consumer in favor of the Louisiana user.[19] Perhaps so, but

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[18]The brief for the United States, n.47, p. 51, illustrates the effect of this credit: "This difference can be illustrated by the following example. Owner A has 1000 mcf of OCS gas; owner B has 500 mcf of OCS gas and 500 mcf of gas subject to Louisiana's severance tax. A owes $70 of first use tax; B owes $35 of first use tax and $35 in severance tax. B, however, pays only $35 in first use taxes. He owes no severance tax because he can credit the first use payment against the severance tax liability."

[19]In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), this Court held unconstitutional a Louisiana use tax which on its face was merely complementary to a sales tax, but in operation discriminated against out-of-state purchases. *See also Nippert v. City of Richmond*, 327 U.S. 416 (1946).

it is hard to tell from the pleadings what adjustments can be made in the base prices, and what allowances can be made between buyers and sellers which might reduce or eliminate any disadvantage of one over the other. This Court has said:

> "in each case it is our duty to determine whether the statute under attack, whatever its name may be, will in practical operation work discrimination against interstate commerce. [*Best & Co. v. Maxwell,* 311 U.S. 454, 455-456.] This concern with the actuality of operation, a dominant theme running through all state taxation cases, extends to every aspect of the tax operations. . . . Considered in isolation, the Louisiana use tax is discriminatory; it was intended to apply primarily to goods acquired out-of-state and used in Louisiana. If it stood alone, it would be invalid. However, a proper analysis must take 'the whole scheme of taxation into account.'" *Halliburton Oil Well Cementing Co. v. Reily,* 337 U.S. 64, 69 (1963).

So here, instead of being discriminatory, the "actuality of operation" may show that the tax is a "compensating" tax intended to complement the State severance tax as the use tax complemented the sales tax in *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1937).

The plaintiffs also assert that the Louisiana tax is invalid because it does not meet the *Washington Stevedoring* case's requirement that the tax must be fairly apportioned. It would seem that that test would be of prime importance when a State is imposing a tax on a business's gross revenues or on its assets as a whole, when, in order to avoid multiple taxation by numerous States, each should tax only the proportion of the entirety which falls within its domain. Here the tax is on the total amount of natural gas within the State and

subject to use there. Just as a sales tax, or a severance tax, is imposed on the total amount of the commodity sold or produced, so it would seem appropriate to levy a use tax on the total amount involved. It does not seem to the Special Master that the apportionment requirement has any application here, unless the tax is so large as to put a barrier in the path of interstate commerce. If it does in fact obstruct or hinder interstate commerce it is bad; but that is a factor which would have to be developed in a full hearing. *Cf. Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

Probably the case which on its facts is closest to this one is *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157 (1954). In that case Texas levied what it termed an occupation tax on "gathering" gas, an activity the regulation of which is left to the States by the terms of the Natural Gas Act. 15 U.S.C. 717(b). In the artificial definition of "gathering" prescribed by the Texas law, it included "taking" gas from the outlets of a scrubbing plant, where the liquid and liquefiable hydrocarbons are separated from the wet gas and dry gas suitable for pipeline transportation is produced. The Court found that after this "taking" there was no separable local activity not an integral part of the flow of interstate commerce. The "taking" the Court held was not a local event separable from the interstate transportation. It was not an activity like producing natural gas, generating electricity, or mining ore, activities upon which a tax may be levied if it is fair and not a burden or hindrance. A real "gathering" tax might be different. Applying the *Michigan-Wisconsin Pipeline* case to Louisiana's uses as defined in the act would result in some of the acts being too intimately connected with interstate transmission to survive. However, the statute has a separability clause. La. Rev. Stat. 47:1307, Sec. 2. Some of the uses may be constitutionally taxable even

though others are bad. Probably the best cases can be made for the "uses" defined as "processing for the extraction of liquefiable component products or waste materials" or as "use in manufacturing." La, Rev. Stat. 47:1302(8).

There is a very real dispute among the parties as to the legal effect of the "processing" use. The plaintiffs would have the Court hold that the processing does not interrupt the transportation process and that the gas delivered at the outlet of the processing plant is the same gas received at the entry with impurities and hydrocarbons removed. Louisiana would analogize the processing process as being similar to the manufacture of a new product. They would like to prove that it changes the chemical content of the gas so that what comes out of the plant is different from what goes in.[20]

In passing upon the constitutionality of other use taxes, this Court has said:

> Not the tax in a vacuum of words but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern. *Nippert v. Richmond,* 327 U.S. 416, 431 (1946).

If it were not for the time factor which favors Louisiana and permits it to continue to collect a quarter of a billion dollars a year and to gain an enormous financial advantage from the use of the funds even if required to give a refund in the end, it would be obviously advantageous to permit the parties to support their divergent positions by evidence relevant to the interpretation and

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[20]The parties have not addressed the significance of the "use in manufacturing" use, but since it must take place within the State to be taxable one can assume that the tax credits and exclusions referred to above would minimize any tax on this use.

administration of the law, the physical features of the entire process, and the economic impacts on and adjustments by buyers and sellers and consumers. However, the plaintiffs have not asked for interim relief. The best way to minimize the time factor is to press the proceedings forward as expeditiously as possible. I cannot conclude that the time factor justifies the Court in granting the motion on the pleadings.

RECOMMENDATIONS

The Special Master recommends that:

1) The motion of the defendant for the dismissal of the complaint be denied.

2) The plaintiffs' motion for judgment on the pleadings be denied without prejudice to a reconsideration of the issues raised on the basis of further proceedings.

Respectfully submitted,

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Special Master

September 15, 1980

No. 83, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,
Plaintiffs,

v.

STATE OF LOUISIANA,
Defendant.

ON REPORT OF THE SPECIAL MASTER DATED SEPTEMBER 15, 1980

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No. 83, Original

IN THE

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OCTOBER TERM, 1978

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

ON REPORT OF THE SPECIAL MASTER DATED SEPTEMBER 15, 1980

EXCEPTIONS OF THE PLAINTIFF STATES

The State of Maryland, the State of Illinois, the State of Indiana, the Commonwealth of Massachusetts, the State of Michigan, the State of New York, the State of Rhode Island and Providence Plantations, and the State of Wisconsin ("the plaintiff states"), by their undersigned attorneys, except to the Report of the Special Master dated September 15, 1980, and ordered filed October 6, 1980, in the following respects:

Exception No. I

The plaintiff states except to the Special Master's misstatement of the applicable Supremacy Clause test,

Report at 21, 27, and his failure to conclude that the First Use Tax is in conflict with and preempted by the Natural Gas Act and the Natural Gas Policy Act. Report at 21-22.

Exception No. II

The plaintiff states except to the Special Master's finding that the "ongoing dispute between the parties" about the "processing," Report at 28; FERC's ability to make adjustments for the First Use Tax, Report at 21, 29; the Commission's "final decision as to the allotment of the tax," Report at 27-28; and the degree to which the tax affects FERC's comprehensive regulatory powers, Report at 27, are relevant to the determination of the plaintiffs' claim that under the Supremacy Clause the First Use Tax is in conflict with and preempted by the Natural Gas Act and the Natural Gas Policy Act.

Exception No. III

The plaintiff states except to the Special Master's apparent conclusion that the First Use Tax does not conflict with and is not preempted by the Outer Continental Shelf Lands Act. Report at 29-30.

Exception No. IV

The plaintiff states except to the Special Master's refusal to decide that the First Use Tax discriminates on its face against interstate commerce. Report at 34-35.

Exception No. V

The plaintiff states except to the Special Master's finding that "what adjustments can be made in the base prices, and what allowances can be made between buyers and sellers which might reduce or eliminate any disadvantage of one over the other," Report at 35; and "the very real dispute among the parties" about "processing," Report

at 27, are relevant to the determination of the plaintiffs' claim that the First Use Tax discriminates against interstate commerce and therefore violates the Commerce Clause; and, in this regard, the plaintiff states further except to the Special Master's suggestion that the First Use Tax, which falls almost exclusively on federal OCS gas, would not discriminate against interstate commerce if it were, as the Special Master erroneously suggests it could be, a "'compensating' tax intended to complement the State severance tax," which applies only to Louisiana gas. Report at 35.

Exception No. VI

The plaintiff states except to the Special Master's conclusion that "the [fair] apportionment requirement has [no] application here, unless the tax is so large as to put a barrier in the path of interstate commerce." Report at 36.

Exception No. VII

The plaintiff states except to the Special Master's recommendation that their motion for judgment on the pleadings be denied at this time and to each and every reason assigned by the Special Master for this recommendation. Report at 38.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1978

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

ON REPORT OF THE SPECIAL MASTER DATED SEPTEMBER 15, 1980

BRIEF IN SUPPORT OF THE EXCEPTIONS OF THE PLAINTIFF STATES

STATEMENT

I. History of the Proceedings

On March 29, 1979, Maryland, Illinois, Indiana, Massachusetts, Michigan, New York, Rhode Island, and Wisconsin ("the plaintiff states") filed their motion for leave to file a complaint and the proposed complaint, which invoked the original jurisdiction of this Court to contest the constitutionality of the Louisiana First Use Tax on Natural Gas. Alleging great harm to their sovereign and quasi-sovereign interests, the plaintiff

states challenged the tax on Supremacy Clause, Commerce Clause, Contracts Clause, and Import-Export Clause grounds, as well as under the Equal Protection Clause of the Fourteenth Amendment. The key components of the plaintiffs' Supremacy Clause challenge emphasized the tax's preemption by and conflict with the Natural Gas Act, the Natural Gas Policy Act, the Outer Continental Shelf Lands Act, and the Coastal Zone Management Act. The plaintiffs alleged that the First Use Tax violated the Commerce Clause, among other reasons, because it facially discriminated against interstate commerce and was not fairly apportioned.

Rejecting Louisiana's contention, in its brief in opposition, that this case was not appropriate for the exercise of original jurisdiction, this Court, on June 18, 1979, granted the plaintiffs' motion for leave to file the complaint. On August 17, 1979, the defendant filed its answer, asserting the validity of the tax. The plaintiffs filed a motion for judgment on the pleadings on September 18, 1979, which was supported by various *amici curiae,* including the United States and the Federal Energy Regulatory Commission, and seventeen natural gas pipeline companies that were prospective intervenors in the case. The motion of the plaintiff states pressed for judgment on the Supremacy Clause issues and the facial discrimination and fair apportionment Commerce Clause issues. Louisiana then moved to dismiss the complaint on October 22, 1979, on the same grounds asserted in its original brief in opposition for denying leave to file the complaint.

On March 3, 1980, this Court appointed John F. Davis, Esquire, as Special Master and referred to him all of the pending motions except Louisiana's for dismissal of the complaint. Following a hearing on March 21, 1980, at which the plaintiffs vigorously contended that the case

was ripe for judgment on the pleadings and pressed for decision on the motion, and the defendant sought protracted evidentiary hearings, the Special Master required Louisiana to file a proffer specifying the factual matters it believed justified evidentiary hearings. Louisiana responded with a 116-page submission largely concerned with factual averments arguably relevant only to constitutional claims not pressed in the plaintiffs' motion.[1] On June 19, 1980, the Special Master heard argument on the motion for judgment on the pleadings and on the defendant's motion to dismiss. The Report of the Special Master recommending denial of the motion to dismiss and denial without prejudice of the motion for judgment on the pleadings is dated September 15, 1980, and was ordered filed by this Court on October 6, 1980.

II. History and Operation of the First Use Tax

The First Use Tax, effective April 1, 1979, imposed a tax of seven cents per thousand cubic feet (Mcf) upon the first occurrence of any "use" of natural gas within Louisiana not subject to state severance taxes. La. Rev. Stat. Ann. § 47:1301-1307 (West Supp. 1980). "Use" is defined as:

> the sale; the transportation in the state to the point of delivery at the inlet of any processing plant; the transportation in the state of unprocessed gas to the point of delivery at the inlet of any measurement or storage facility; transfer of possession or relinquishment of control at a delivery point in the state;

[1] Only thirteen pages of the proffer purported to concern issues raised in the plaintiffs' motion and much of this was devoted to asserted legal premises and legal argument. *See* Reply of the Plaintiff States to the Defendant's Proffer of Proof. In this reply, the plaintiffs also contended that on the basis of Louisiana's admissions in the proffer and in light of legal principles recognized in this Court's natural gas decisions, judgment on the pleadings was particularly appropriate.

> processing for the extraction of liquefiable component products or waste materials; use in manufacturing; treatment; or other ascertainable action at a point within the state.

La. Rev. Stat. Ann. § 47:1302(8).[2] As the legislative history of the First Use Tax makes apparent and as the Special Master found to be undisputed, Report at 3-5, the tax is imposed on natural gas produced from federally owned submerged lands on the outer continental shelf (OCS) outside Louisiana's boundaries, and from federal enclaves within the state.

A variety of provisions ensure that the burden of the tax is not imposed on Louisiana citizens, businesses, or the producers of natural gas. The First Use Tax is not imposed on gas otherwise subject to a severance, production, or import tax levied by any state, territory, or the United States, La. Rev. Stat. Ann. § 47:1303, and because Louisiana levies a severance tax on all in-state production, La. Rev. Stat. Ann. § 47:633(g), the latter is not subject to the First Use Tax.

As a companion measure to the First Use Tax, the Louisiana legislature enacted a Severance Tax Credit that permits those few producers who might otherwise be liable for the First Use Tax on OCS gas to credit that liability, dollar-for-dollar, against their severance tax liability. La. Rev. Stat. Ann. § 47:647. According to the architect and chief proponent of the First Use Tax, in most cases the pipelines rather than the producers have become the contractual owners of the OCS gas by the time it arrives in Louisiana for processing. Hearings on H.B. 768, Senate Committee on Revenue and Fiscal Affairs (June 26, 1978) at 3 (Testimony of Mr. Tauzin). However, "[i]n about 15% of the cases the producer is still the owner at the processing stage. In that event, in those cases there is a

[2] La. Rev. Stat. Ann. § 47:1303F provides that: "If any use as defined . . . and first occurring is determined not to be a constitutionally taxable incident, the tax shall be imposed upon the use first occurring thereafter."

separate bill which Representative LaBorde is author which will grant producers a tax credit against the severance taxes for any amount of this tax they could not pass on to the pipeline company." *Id.* at 3-4. The clear purpose of the severance tax credit measure is to benefit those who are producing OCS natural gas in the federal domain offshore Louisiana and who are also producing gas within the state and its waters in the natural gas-rich Southern Louisiana area. *See Mobil Oil Corp. v. FPC*, 417 U.S. 283, 293 (1974).

Exempted from the First Use Tax is natural gas consumed in processing and those products removed during that processing within the state. La. Rev. Stat. Ann. § 47:1303A.

> And it is important to know that 98 and a half percent of that product upon which we measure the tax is shipped out of state. Only about one and a half percent of that product remains as dry gas in Louisiana. There is a separate bill also authored by Mr. Bagert that deals with the impact of that one and a half percent.

Hearings on H.B. 768, Senate Committee on Revenue and Fiscal Affairs (June 26, 1978) at 4 (Testimony of Mr. Tauzin).

Another companion measure to the First Use Tax grants a tax credit to utilities and other direct users of natural gas in the state who might otherwise be liable for the burden of the tax with respect to the minute amount of OCS gas that remains in Louisiana. La. Rev. Stat. Ann. § 47:11. Typically, producers of OCS gas retain the ownership of products removed in processing, such as butanes, propanes, and ethanes. *See* Report at 5. The Louisiana Senate committee considering the First Use Tax was told in 1978 that "[a]pproximately 5% of the product is removed in the processing stage as liquid-propane, butane, methanes and what have you. Additionally, you need to know that that particular amount, the 5% is exempted in

the bill." Hearings on H.B. 768, Senate Committee on Revenue and Fiscal Affairs (June 26, 1978) at 3 (Testimony of Mr. Tauzin). Thus, in-state processors and those in-state producers who also produce OCS gas are protected from the tax.

Finally, in a supreme effort to eliminate any possible impact on in-state interests and to "export the tax," in its totality, Hearings on H.B. 768, House Committee on Ways and Means (June 6, 1978) at 39 (Testimony of George Gibson), the statute characterizes the First Use Tax as a "cost associated with uses made by the owner in preparation of marketing of the natural gas" and abrogates any contract that shifts liability for the tax back to a producer by rendering unenforceable "[a]ny agreement or contract by which an owner of natural gas claims a right of reimbursement or refund of such taxes from any other party in interest, other than a producer of such natural gas." La. Rev. Stat. Ann. § 47:1303C. When a Louisiana legislator asked "What in the bill . . . will try to prevent the producer from having to pay these costs," the First Use Tax's chief proponent pointed to the contract abrogation feature of section 1303C. Hearings on H.B. 768, House Committee on Ways and Means Committee (June 6, 1978) at 6 (Colloquy between Messrs. Leach and Tauzin). Indeed, this provision was deemed by the sponsor as so "essential to the whole process," Hearings on H.B. 768, Senate Committee on Revenue and Fiscal Affairs (June 26, 1978) at 5 (Testimony of Mr. Tauzin), that if the courts invalidated it and upheld such contracts, the whole First Use Tax would self-destruct. Act No. 294, § 4(2), 1978 La. Sess. Law Serv. 486 (West).

The verbatim legislative history of the 1978 hearings on the First Use Tax proposal is replete with colorful testimony that makes it obvious that the First Use Tax is "not just an ordinary little tax," Hearings on H.B. 768, Senate Committee on Revenue and Fiscal Affairs (June

26, 1978) at 10 (Testimony of Mr. Tauzin), but a tax that "*wants to hit only the easterners.*" Hearings on H.B. 768, House Committee on Wavs and Means (June 6, 1978) at 37 (Testimony of Ed Steimel) (emphasis added). Indeed, from the mouths of the framers of the First Use Tax and its companion measures, one learns that the legislative package was amended to "*guarantee against any impact upon producers and people in this state* who would otherwise possibly feel some impact from the imposition of the tax," Hearings on H.B. 768, Senate Committee on Revenue and Fiscal Affairs (June 26, 1978) at 3 (Testimony of Mr. Tauzin) (emphasis added); that "[i]t is impossible for" them "to suffer," *Id.* at 4; and that "every possible concession" had been made to the producers. Hearings on H.B. 768, House Committee on Ways and Means (June 6, 1978) at 5 (Testimony of Mr. Tauzin). *See also* Hearings on H.B. 768, House Committee on Ways and Means (June 5, 1978) at 4 (Testimony of Mr. Bagert):

> We don't want to levy the first use tax and have it affect people and businesses in Louisiana. . . . As far as I'm concerned I don't want the first use tax if it's going to do that and that's why I initially authored this bill and then got together and worked it out with Billy [Tauzin].

The framers' desire, and the intention of the statute, to pass on the tax to the out-of-state consumers of natural gas is not disguised in the slightest. *See* Hearings on H.B. 768, Senate Committee on Revenue and Fiscal Affairs (June 26, 1978) at 27 (Testimony of Mr. Tauzin) ("FERC is going to have to allow this particular tax to pass on through."); Hearings on H.B. 768, House Committee on Ways and Means (June 5, 1978) at 12 (Testimony of Mr. LaBorde) ("If the first use tax is passed, it's going to be a passed on tax, no question about it."). And they frankly admit that they broke the First Use Tax package into separate bills to create a veneer of constitutionality. Hearings on H.B. 768, House Committee on Ways and

Means (June 5, 1978) at 4 (Testimony of Mr. Tauzin) ("If you put the two together you've given the people who want to defeat it a chance to go to court and say look they've passed the act to just cover people outside Louisiana."); that one of their motives was to even the score for the actions of other states (e.g., the enactment of Montana's coal severance tax), Hearings on H.B. 768, Senate Committee on Revenue and Fiscal Affairs (June 26, 1978) at 28 (Testimony of Mr. Tauzin) ("They've been doing it to us."); and that they expect to gain from the tax even if it is invalidated. Hearings on H.B. 768, Senate Committee on Revenue and Fiscal Affairs (June 26, 1978) at 6 (Testimony of Mr. Tauzin) ("[T]he total amount that we might be liable for in the event that we should lose the litigation is available for refund at 6% interest. We are likely to make more than 6% on it in investments. We are actually going to probably come out a little bit ahead on it"). This "little bit ahead" has already amounted to "almost $4.7 million." Hargroder, *1st Use Tax Will Profit La. Even If Cash Is Returned,* The Times-Picayune, Oct. 7, 1980, ¶ 1 at 17. (For the convenience of the Court, a copy of this news article is reprinted as an appendix to this brief.)[3]

III. FERC's Responses to the First Use Tax

The Federal Energy Regulatory Commission ("the FERC"), through the adoption of an automatic tracking

[3] The frankness of the First Use Tax sponsors in admitting their motives in the 1978 committee hearings appears again in the 1980 hearings called to consider bills (not reported out of committee) designed in the face of this litigation to remove some of the more obnoxious and discriminatory exemptions to the First Use Tax. *See* Hearings on House Bills 1241, 1242, 1243, 1244, House Committee on Ways and Means (July 1, 1980) at 10 (Testimony of Attorney General Guste) ("I simply want to tell you that I believe in all sincerity, or I wouldn't be here that it would remove those arguments which could hurt the state[']s position when we pass these repeals, it will help us win the case.").

mechanism,[4] has provided a procedure for consumer reimbursement of First Use Tax payments by the natural gas pipeline companies. Although these charges are being collected subject to refund pending final judicial determination of the constitutionality of the tax, the immediate burden and incidence of the tax is being passed on directly to ultimate consumers.[5] More recently, the FERC modified its prior orders,[6] and issued a show cause order[7] on the question of whether persons other than natural gas

[4] State of Louisiana First Use Tax in Pipeline Rate Cases, Docket No. RM 78-23, Order No. 10, "Order Establishing Procedures Governing Pipeline Recovery of the State of Louisiana First Use Tax," issued August 28, 1978, 43 Fed. Reg. 45,553 (Oct. 3, 1978); Order No. 10-A, "Order on Rehearing, Modifying Prior Order, Amending Regulation and Requesting Comment," issued December 20, 1978, 43 Fed. Reg. 60,438 (Dec. 28, 1978), *appeal docketed,* Tennessee Gas Pipe Line Co. v. Fed. Energy Regulatory Comm'n, No. 78-38-13, et al. (5th Cir. Dec. 26, 1978); Order No. 10-B, "Order on Rehearing, Modifying Prior Order and Amending Regulations," issued March 2, 1979, 44 Fed. Reg. 13,460 (Mar. 12, 1979); and "Order Directing the Solicitor to Seek Either an Order of the Court Permitting the Commission to Modify Its Orders or a Remand of the Record" app. A, issued July 13, 1979, 44 Fed. Reg. 46,291 (Aug. 7, 1979).

[5] Estimates of the amount to be collected annually from the First Use Tax have varied from $225,000,000 (Plaintiffs' Complaint, para. XIV) to $275,000,000 (Brief of Pipeline Companies at p. 15). Louisiana authorities report annual collections even higher than these estimates. On July 1, 1980, Louisiana Attorney General Guste told state legislators: "That tax gentlemen is producing about 300 million dollars a year. 300 million dollars a year and it is now counted in escrow deposited at rates of interest bearing from 10 to 14%." Hearings on House Bills 1241, 1242, 1243, and 1244, House Committee on Ways and Means (July 1, 1980) at 1.

[6] State of Louisiana First Use Tax in Pipeline Rate Cases, Docket No. RM 78-23, Order No. 10-C, "Interstate Pipeline Recovery of State of Louisiana First Use Tax," issued April 24, 1980, 45 Fed. Reg. 29,011 (May 1, 1980).

[7] State of Louisiana First Use Tax in Pipeline Rate Cases, Docket No. RM 78-23 (Phase II), "Order Instituting Show Cause Proceeding," issued April 24, 1980, 45 Fed. Reg. 39,535 (June 11, 1980).

consumers should bear the burden of the First Use Tax while its constitutionality is being litigated. Aside from these possible administrative initiatives, the FERC has been stymied in its attempts to litigate the constitutionality of the First Use Tax in the lower federal courts. *FERC v. McNamara,* Civil Action No. 78-384 (M.D. La., order abstaining filed Jan. 26, 1979), *appeal noted,* No. 79-1403 (5th Cir.). Indeed, at oral argument of the FERC appeal, the Fifth Circuit indicated its intention to stay the proceedings pending further developments in this case. *See* 45 Fed. Reg. 29,011, 29,012 n.9 (May 1, 1980).

In the meantime, huge amounts of First Use Tax payments are being collected. These amounted to $364,037,997.23, which had earned $17,597,967.89 in interest (at rates between 8 and 14 percent), as of September 30, 1980. Hargroder, *1st Use Tax Will Profit La. Even If Cash Is Returned,* The Times-Picayune, Oct. 7, 1980, ¶ 1 at 17.

IV. Recommendations of the Special Master

Although declining to recommend the grant of the motion for judgment on the pleadings, the Special Master resolved a number of issues in favor of the plaintiff states.

1. He rejected Louisiana's claim that the only reason the cost of the tax is now borne by the plaintiffs and their citizens is because of the FERC orders. Report at 12.

2. He rejected Louisiana's contention that interstate transmission of natural gas commences at the tailgate of the processing plant and concluded that the federal OCS gas involved in this case was in continuous movement in interstate commerce. Report at 32.

3. He noted that, by way of tax credits, exemptions, and exclusions for in-state users, the impact of the tax appeared directed at interstate sales, Report at 27, and

found, in particular, that "Louisiana customers of local utilities and local consumers buying directly from the pipelines are protected in whole or in part from the incidence of the tax which is passed on to consumers out of the State." Report at 34.

4. He apparently rejected out of hand virtually all but a few of the proffered taxable "uses" as even arguably constitutionally sustainable. Report at 23, 36-37.

5. He found that the "FERC had previously accepted contracts that provided that the processing involved and the tax on it were properly considered costs of producing liquid and liquefiable hydrocarbons, not properly to be borne by consumers of the natural gas." Report at 28.

6. And, perhaps most importantly, he conceded:

> As far as the Interstate Commerce Clause is concerned, the Special Master believes that a determination on the validity of the Louisiana tax could be made on the pleadings, plus a generous application of judicial notice.

Report at 21.

In addition, the Special Master acknowledged that the First Use Tax "can be considered the most recent step in Louisiana's continuing effort to press its claim to profit from the production of oil and gas off its coast." Report at 25 n.16. And he noted the "substantial advantage" Louisiana is deriving from the differential between the six percent statutory interest rate on First Use Tax refunds and the present interest rate on investments. Report at 18.

On the ultimate questions addressed by the Special Master, his remarks support the position of the plaintiff states. With respect to the plaintiff states' contention that the First Use Tax is an impermissible attempt to regulate the transportation and sale of natural gas in interstate

commerce, the Special Master acknowledged: "They may be right since the impact of the tax appears to be directed at interstate sales by reason of the exemptions and credits granted intrastate users." Report at 27. Of La. Rev. Stat. Ann. § 47:1303C, he noted:

> The most substantial possible conflicts appear to be between the Louisiana tax law and the Natural Gas Act, particularly the provisions with respect to passing the burden of the tax back to the producers or forward to the consumers.

Report at 30. As to the Severance Tax Credit, the Special Master admitted:

> Since there is no apparent relation between the ownership of outer continental shelf gas and the production of gas in Louisiana, it is hard to understand Louisiana's motive in permitting this credit, but it obviously aids an intrastate operation in a way not available to a pipeline engaged only in interstate transportation or producing gas outside of Louisiana.

Report at 34.

The reasons the Special Master recommended withholding judgment on the plaintiffs' Natural Gas Act claims are twofold. First, he desired to know as a factual matter "how great an effect on the regulatory power of the FERC" is caused by the First Use Tax or in essence what "administrative adjustments" the FERC could undertake "to permit the State and federal programs to coexist." Report at 27, 21. *See also* Report at 29. Second, the Special Master noted that "[t]here is an ongoing dispute between the parties as to the legal effect of the [natural gas] processing," which he would not resolve on the basis of prior judicial opinions on the issue. Report at 21, 28-29.

On the Commerce Clause questions, the Special Master again wanted to know "what adjustments can be made [by the FERC] in the base prices, and what allowances can be

made between buyers and sellers which might reduce or eliminate any disadvantage of one over the other," Report at 35, and again cited to the processing dispute. Report at 37. He also believed that facts were needed to show whether or not the First Use Tax was a "compensating" tax, Report at 35, and concluded as a matter of law that the "fair apportionment" Commerce Clause analysis does not have "any application here," unless as a factual matter "the tax is so large to put a barrier in the path of interstate commerce." Report at 36.

ARGUMENT

I.

THE FIRST USE TAX MUST BE INVALIDATED AS A VIOLATION OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

The plaintiff states submit that in recommending denial of the motion for judgment on the pleadings the Special Master has failed to appreciate the nature and reach of the Supremacy Clause of the United States Constitution.[8] And although he has laid every conclusory predicate for a judgment on the pleadings in the plaintiffs' favor, the Special Master has erroneously failed to follow through to the only possible legal conclusion. Moreover, he has ignored the strictly legal analysis established by this Court to resolve Supremacy Clause issues. *See, e.g., Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 271-72 (1977) (Supremacy Clause challenges are viewed as statutory for purposes of deciding statutory claims first to avoid unnecessary constitutional adjudications).

The Supremacy Clause invalidates or preempts state legislation that "stands as obstacle to the accomplishment

[8] Article VI, cl. 2, of the Constitution provides that "[t]his Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

and execution of the *full* purposes and objectives of Congress" in enacting the relevant federal statutes. *Hines v. Davidowitz*, 312 U.S. 52. 67 (1941); *McCulloch v. Maryland*, 17 U. S. (4 Wheat) 316, 427 (1819) ("It is of the very essence of supremacy to remove *all* obstacles to its action . . . ."). Even harmonious state legislation will fall if the federal regulatory scheme is "so pervasive," or "touches a field in which the federal interest is so dominant," or if the object sought by the federal law reveals a purpose to dominate state law. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-58 (1978).[9] Thus, in the present case, where there is a comprehensive regulatory scheme, it is not, as the Special Master suggests, that *factual* evidence of *actual* state interference with the federal scheme is necessary to invalidate the First Use Tax. The mere *possibility* of interference is enough. *See Northern Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84, 92 (1963) ("[A]lthough collision between the state and federal regulation may not be an inevitable consequence, there lurks such imminent possibility of collision in orders purposely directed at interstate wholesale purchasers that the orders must be declared a nullity in order to assure the effectuation of the comprehensive federal regulation ordained by Congress."). *See also San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). ("To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power assorted by Congress and requirements imposed by state law.").

Moreover, Supremacy Clause analysis, unlike most other areas of constitutional law, does not involve a balancing of competing interests or an inquiry into the nature or strength of the purposes served by the chal-

[9] DeCanas v. Bica, 424 U.S. 351, 358 n.6 (1976), also suggests that a state law can be found invalid "if it imposes additional burdens not contemplated by Congress."

lenged state enactment. *See Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. at 93. If the state law conflicts with or is preempted by federal law, it may not stand. And this inquiry is purely a legal question. *Douglas v. Seacoast Products*, 431 U.S. 265, 271-72 (1977); *Philadelphia v. New Jersey*, 430 U.S. 141 (1977).

The Special Master has erroneously disregarded these sound principles to delay decision on the plaintiff states' Natural Gas Act preemption argument and to ignore their contention that the Outer Continental Shelf Lands Act invalidates the First Use Tax.

A. *The First Use Tax is preempted by and in conflict with the Natural Gas Act.*

In the Natural Gas Act, Congress "meant to create a comprehensive and effective regulatory scheme." *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972); *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 520 (1947). The Act confers on the Federal Energy Regulatory Commission jurisdiction over the transportation and sale for resale of natural gas in interstate commerce, 15 U.S.C. § 717, including the approval of rates and charges, 15 U.S.C. §§ 717c & 717d, and the determination of costs allowable to natural gas companies. *FPC v. United Gas Pipe Line Co.*, 386 U.S. 237, 243 (1967). *See also* 15 U.S.C. §§ 3717F & 3320.[10]

A key purpose of these far-reaching provisions of the Natural Gas Act is "to protect ultimate consumers of

[10] Although the Natural Gas Act envisions a dual state-federal regulatory authority in many matters, it leaves to the states no room for direct regulation, *Public Utilities Commission of Ohio v. United Fuel Gas Co.*, 317 U.S. 456 (1943), or indirect regulation, *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84 (1963), of the transportation and sale for resale of natural gas in interstate commerce.

natural gas from excessive charges." *FPC v. Interstate Gas Co.*, 336 U.S. 577, 581 (1949). *See also Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 388-89 (1959). This Court has said that the FPC (now the FERC) "must be free to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 331 (1974). Similarly, the Natural Gas Act recognizes "the importance of nationally controlling interstate pipelines in order to preserve 'equality of opportunity and treatment among the various communities and states concerned.'" *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 471 (1950). *See also FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 633-35 (1972); *Louisiana v. FPC*, 476 F.2d 140, 142 (5th Cir. 1973) ("A major purpose [of the Natural Gas Act] was to prevent the 'haves' from being unfair to the 'have nots.'").

On the basis of the record in this case, the Special Master has found more than enough to establish that the First Use Tax touches this pervasive federal scheme and, even more obviously, that the operation of the tax results in the possibility of collision with the Natural Gas Act and the inhibition of its full purposes. First, he determined (and had to find) that the tax is plainly aimed at interstate sales and out-of-state consumers. Report at 27. *See Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. at 92 ("The danger of interference with the federal regulatory scheme arises because these orders are unmistakably and unambiguously directed at purchasers who take gas in Kansas for resale after transportation in interstate commerce.") Second, he found the OCS gas to be in interstate commerce, within Commission jurisdiction, and not interrupted by in-state processing. *Id.* at 31-32. Third, he concluded (and the legislative history left him no choice but to conclude) that local interests were carefully protected from the First Use Tax.

Id. at 34.[11] Fourth, he recognized that the contract abrogation feature of the First Use Tax is inconsistent with contracts previously accepted by the FERC. *Id.* at 27-28. Fifth, he had to conclude, and indeed Louisiana admitted, that the tax was intended to be passed on to consumers via the regulatory mechanism. *Id.* at 28. Few state taxes are so intended, but then the First Use Tax is "not just an ordinary little tax." *See supra* at 10-11. Thus, by abrogating tax shifting contracts and declaring the tax to be a cost of marketing the gas, the Louisiana statute attempts to tie the hands of the FERC on cost determination and to force out-of-state consumers to pay the tax.

One reason the Special Master failed to reach the inevitable conclusion from this mountain of evidence of intrusion into the regulatory scheme of the Natural Gas Act was his desire to know how great an effect the First Use Tax had on that scheme and what the FERC could do to adjust competing interests. The plaintiff states submit that this inquiry is simply irrelevant. Congress obviously intended that the determination of and control over cost-pass through be for the Commission. *FPC v. United Gas Pipe Line Co.,* 386 U.S. at 243. That discretion is presently hamstrung by the First Use Tax since the only FERC choice is on which of two innocent parties to inflict the financial damage — those it regulates or consumers. But even if the FERC could take some action to balance efficient regulation with prevention of consumer overcharges, the prospect or even the possibility of a state-induced cruel or difficult regulatory choice is wholly at odds with this Court's view of the Natural Gas Act. *See Northern Natural Gas v. State Corporation Commission of Kansas,* 372 U.S. 84 (1963).

[11] The Special Master's apparent uncertainty regarding the motive for the Severance Tax Credit, *see supra* at 16, is easily dispelled when it is realized that those producing OCS gas are the same producers operating in Southern Louisiana. That is, they are local interests receiving local protection.

Another reason the Special Master declined to recommend the grant of the plaintiffs' motion for judgment on the pleadings on their Natural Gas Act claim was the "dispute between the parties as to the legal effect of the processing." Report at 28. The nature of natural gas processing has nothing to do with the plaintiffs' Supremacy Clause contentions. The Special Master has already concluded that processing does not interrupt the flow of OCS natural gas in interstate commerce or affect FERC jurisdiction over the gas. Aside from the "processing dispute," the First Use Tax interferes with FERC jurisdiction over the transportation and sale of natural gas and the allowance of costs related to these activities. *See supra* at 10-11. Moreover, the plaintiffs' view of processing as not affecting the nature of the gas for purposes of the Natural Gas Act is well established as a matter of law and judicial precedent. *Public Service Commission v. FERC,* 610 F.2d 439, 444 (6th Cir. 1979); *Deep South Oil Co. v. FPC,* 247 F.2d 882, 888 (5th Cir. 1957), *cert. denied,* 355 U.S. 930 (1958). Finally, it is important to note that the Special Master's focus on natural gas processing with respect to the Supremacy Clause claim is simply another attempt to look into the regulatory mind of the FERC to determine what may or may not be a "reasonable" cost to pass on to consumers. *See* Report at 29. This inquiry, however, is one for the FERC, not for the Special Master or this Court.

To delay the resolution of this case and invalidation of the First Use Tax with its annual costs to natural gas consumers of $300 million for such a reason is unconscionable. Rather this Court should focus on the terms of the state statute, its graphic legislative history, and its obvious legislative intent to reward the haves at the expense of the have nots. In light of the purpose of the Natural Gas Act to overcome the balkanization of natural gas regulation and the discriminatory practices of producing states, the plaintiffs submit that this tax cannot stand.

B. *The First Use Tax is preempted by and in conflict with the Outer Continental Shelf Lands Act.*

The Special Master correctly concluded that no evidentiary hearing was needed to decide the purely legal question of whether the First Use Tax was preempted by and in conflict with the Outer Continental Shelf Lands Act ("OCSLA"). 43 U.S.C. § 1332 (1976). However, he erroneously ignored the assertion of the plaintiff states that the federal ban on application of state taxation laws to the outer continental shelf, 43 U.S.C. § 1333(a)(2), prohibits the First Use Tax. Instead, he apparently assumed that the First Use Tax is not a tax on the natural gas itself or its severance but a tax on its transportation, Report at 30, and that the OCSLA tax ban applies only to taxes imposed before the natural gas has been brought into the state. *Id.* at 29. Under the First Use Tax, he said, "no tax is imposed on any action or person until the gas has been brought into the state." *Id.*

The plaintiff states submit that in failing to act favorably on their OCSLA contentions the Special Master has misunderstood the motivation and operation of the First Use Tax and has failed to give appropriate scope to the state tax ban contained in 43 U.S.C. § 1333 (a)(2).

Without a doubt, Louisiana could not directly tax the natural gas produced on the outer continental shelf. The Outer Continental Shelf Lands Act expressly prohibits it. 43 U.S.C. § 1333(a)(2) (1976), *as amended by* Act of Sept. 18, 1976, Pub. L. No. 75-372, 92 Stat. 635 (codified at 43 U.S.C.A. 1333(2)(A) (West Supp. 1980)) ("State taxation laws shall not apply to the outer Continental Shelf.") *Mobil Oil Corp. v. FPC,* 417 U.S. 283, 293 n.7 (1974). This state tax prohibition, reenacted in 1978 in the Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629, demonstrates congressional recognition that such taxation will impede the purpose of

the Act in providing for the orderly development of shelf resources. Even in the absence of such a prohibition, this taxation would be prohibited. *See Mississippi River Fuel Corp. v. Cochreham,* 382 F.2d 929 (5th Cir. 1967), *cert. denied,* 390 U.S. 1014 (1968) (holding that the Louisiana Severance Tax could not constitutionally be imposed on the severance of oil and gas by a lessee under a mineral lease from the United States on federal land in Louisiana).

With the First Use Tax, however, Louisiana tries to accomplish indirectly what it cannot do directly. An avowed purpose of the Louisiana First Use Tax is to compensate the state for the alleged environmental damage caused by the severance of natural gas beyond the boundaries of Louisiana. La. Rev. Stat. Ann. § 47:1301B (West Supp. 1980). Indeed, the defendant has admitted that the purpose of the First Use Tax is to compensate Louisiana for a lack of OCS royalties distributed under the OCSLA and that the tax is aimed at federal OCS gas. *See* Proffer of Proof at ¶¶ 49, 51, 69. And the Special Master himself found that the First Use Tax was "the most recent step in Louisiana's continuing efforts to press its claim to profit from the production of oil and gas off of its coast." Report at 25 n.16.

In concept and operation, the tax is virtually indistinguishable from a severance tax on federal OCS gas. It is justified as an attempt to remedy the alleged discriminatory effect of the state's own severance taxes on Louisiana natural gas producers. La. Rev. Stat. Ann. § 47:1301A. The tax is imposed only if no state severance tax is due or has been paid on the gas and is set at the same rate as the severance tax. La. Rev. Stat. Ann. § 47:647. Although the First Use Tax proclaims that it should not be construed as imposing a tax on the production, severance, or ownership of natural gas produced outside the boundaries of Louisiana, La. Rev. Stat. Ann. § 47:1303E, the clear thrust of the statute is to impose a severance tax on natural gas

produced outside Louisiana. The statute by exemption, credit, and pass-through ensures that the burden of the tax will fall on federal OCS gas and ultimately on the out-of-state consumer.

The Special Master's refusal to recognize that even an "indirect" state severance tax on federal OCS gas, like the First Use Tax, is prohibited by 43 U.S.C. § 1333(a)(2), is compounded by his reading and reliance upon *Portland Pipeland Corp. v. Environmental Improvement Commission, 307 A.2d 1 (Me. 1973), appeal dismissed,* 414 U.S. 1035 (1973). That case rejected a constitutional challenge to a state tax challenged as a tax on oil, but defended as a tax on the transportation of the oil. However, it is important to note that the *Portland Pipeline* case was an Import-Export Clause case not a Supremacy Clause one and that the primary reason the Maine court concluded that the tax was not upon the oil was because over the long run the tax was not related to the volume of oil transported. 307 A.2d at 33-34. The First Use Tax is imposed on the entire volume of federal OCS natural gas passing through the state and thus even under the rationale of *Portland Pipeline* should be considered a tax on federal OCS gas.

The Louisiana First Use Tax contradicts the express language of the OCSLA as well as its statutory purpose of providing for the orderly development of offshore resources and natural gas development on the outer continental shelf. For these reasons, the tax violates the Supremacy Clause and is void in its entirety. Even Louisiana's purported rationales for the First Use Tax raise questions under the Supremacy Clause. The First Use Tax states its concern with the physical and economic waste of Louisiana's gas. La. Rev. Stat. Ann. § 47:1301A (West Supp. 1980). This concern does not support a tax on federal OCS gas moving in interstate commerce, however, because the economic waste of such gas is a matter of exclusive

federal jurisdiction. *FPC v. Transcontinental Gas Pipeline Corporation,* 365 U.S. 1 (1961). To the extent that the Louisiana statute purports to be concerned with the physical waste associated with natural gas severance from the federal domain in the outer continental shelf, Congress has deemed this a federal concern, *see* 43 U.S.C. § 1334(a)(1) (1976), *as amended by* Act of Sept. 18, 1978, Pub. L. No. 95-372, 92 Stat. 636 (codified at 43 U.S.C.A. § 1334(a)(1) (West Supp. 1980)) (authorizing the federal government "to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, . . ."), and has enacted specific schemes for the management of and compensation for such waste. *See* Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1976), *as amended* by Act of July 26, 1976, Pub. L. No. 94-370, 90 Stat. 1013 (codified at 16 U.S.C.A. §§ 1451-1464 (West Supp. 1980)), and Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (codified at 43 U.S.C.A. §§ 1331-1356 (West Supp. 1980)).

II.

THE FIRST USE TAX ON ITS FACE VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

The Commerce Clause, U.S. Const. art. I, § 8, cl. 3, provides that Congress has the power:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

This grant of power to Congress constitutes a withdrawal of power from the states. *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318, 328 (1977). Specifically, the Commerce Clause mandates that a state tax on interstate commerce must be: (1) "fairly apportioned"; (2)

"not discriminat[ory] against interstate commerce"; (3) "applied to activity with a substantial nexus with the State"; and (4) "fairly related to the services provided by the State." *Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734, 750 (1978). If a state tax fails *any one* of these four tests, it must be held unconstitutional as a violation of the Commerce Clause.

The First Use Tax on its face violates two of these criteria: it unfairly discriminates against interstate commerce, and it is not fairly apportioned thus creating the risk of multiple taxation. Accordingly, this Court should grant the plaintiff states judgment on the pleadings on these grounds. *See Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977) (discrimination against interstate commerce); *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157 (1954), *approved in Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 737, 749 n.18 (fair apportionment).

The Special Master specifically recognized that judgment could be enterd on the pleadings regarding the burden of the tax on interstate commerce:

> As far as the Interstate Commerce Clause is concerned the Special Master believes that a determination on the validity of the Louisiana Tax could be made on the pleadings, plus a generous application of judicial notice.

Report at 21. Indeed, it appears that the only reason he failed to grant judgment on the pleadings to the plaintiff states was because of his reluctance to interfere with a "State's prerogative to manage its own fiscal affairs." *Id.* Invalidating a state tax may be, as the Special Master concluded, a "serious limitation" on this "prerogative"; however, this Court has clearly found this "limitation"

does not require evidentiary hearings be held if the state tax, on its face, violates the Commerce Clause. As this Court explained when finding a New York transfer tax unconstitutional on its face:

> Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. . . . We hold only that . . . no State may discriminatorily tax the products manufactured or the business operations performed in any other State.

Boston Stock Exchange v. State Tax Commission 429 U.S. at 336-37.

Moreover, although he found further evidentiary proceedings appropriate, the Special Master properly rejected most of the material which Louisiana proferred as indicating a dispute as to material facts with regard to the Commerce Clause claims. Perhaps the most vivid illustration of this is Louisiana's repeated insistence that the natural gas subject to the First Use Tax is not in interstate commerce and thus its taxation could not possibly violate the Commerce Clause. The Special Master summarily rejected this "proferred fact" and correctly found, as a matter of law, that the gas subject to the First Use Tax is indeed in interstate commerce. Report at 31-32. The plaintiff states submit that simple examination of the First Use Tax will similarly lead this Court to conclude that, as a matter of law, it discriminates against interstate commerce and is not fairly apportioned.

A. The First Use Tax unfairly discriminates against interstate commerce.

The First Use Tax unfairly discriminates against interstate commerce in three separate respects. First, the tax is discriminatorily imposed only on gas imported into Louisiana (whether from a sister state or from outside the

United States) and on gas produced from the OCS.[12] An equivalent tax is not imposed on gas produced in Louisiana or on gas transported into Louisiana from any state that imposes a severance tax. Yet the post production flow of such gas enjoys the same protections and privileges, and subjects Louisiana's environment to the same purported damages, as OCS and imported gas. Second, the First Use Tax, applied in conjunction with the Severance Tax Credit (La. Rev. Stat. Ann. § 47:647), discriminates against — and is intended to discriminate against[13] — interstate commerce because it eliminates the entire burden of the First Use Tax from those pipeline companies who produce natural resources subject to the Louisiana Severance Tax, thus discriminating against pipeline companies who do not. Third, the First Use Tax applied in

[12] As noted above, although Louisiana has continually argued to the contrary, the Special Master correctly found that as a matter of law this gas is in interstate commerce because (a) "natural gas is in interstate commerce during the entire journey" (Report at 32), *i.e.*, from the time the gas is produced for the outer continental shelf through the processing plant to its ultimate destinations, *see* California v. Lo-Vaca Gathering Co., 379 U.S. 366, 369 (1965); and (b) "the movement from the outer continental shelf across the state boundary and up to the processing plant would itself seem to be an interstate journey. *See Continental Oil Co. v. Federal Power Commission,* 370 F.2d 57, 66 (5th Cir. 1966)." Report at 32.

[13] The legislative history is particularly informative in this regard. It is replete with assertions that the legislation will not harm Louisiana, but only out-of-staters. For example, the sponsor of the legislation told his colleagues: "I want to say for the entire package presented to you today, it has been amended as far as we can practically go to *guarantee against any impact upon producers and processors and people in this state* who would otherwise possibly feel some impact from the imposition of the tax." Hearings of H.B. 768, Senate Committee on Revenue and Fiscal Matters (June 26, 1978) at 3 (Testimony of Mr. Tauzin) (emphasis added). Or as another supporter of the tax assured the Louisiana legislators: "I think it's a general consensus and I know it is mine. If the first use tax is passed it's going to be a passed on tax, no question about it." Hearings of H.B. 768, House Committee on Ways and Means (June 5, 1978) at 12 (Testimony of Mr. LaBorde).

conjunction with the Tax Credit for In-State Electric and Natural Gas Utility Service (La. Rev. Stat. Ann. § 47:11) and various exemptions for certain favored in-state uses — *e.g.*, production of sulphur, fertilizer and anhydrous ammonia — that would otherwise be subject to the tax (La. Rev. Stat. Ann. § 47:1303(A)), discriminates against interstate commerce by disadvantaging identically situated out-of-state users.

Thus, the First Use Tax, together with its companion credits and exemptions, is on its very face manifestly "tailored" to fall on interstate commerce and discriminate against out-of-state residents. Moreover, as previously noted, *supra* at 11, the Louisiana legislature actually planned and intended that this tax would fall exclusively on non-residents.[14] However, this Court has expressly found that:

> Any tailored tax of this sort creates an increased danger of error in apportionment, of discrimination against interstate commerce, and of a lack of relationship to the services provided by the State. *See Freeman v. Hewit,* 329 U.S. at 265-266, n.13 (concurring opinion). *A tailored tax, however accomplished, must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce.*

Complete Auto Transit Inc. v. Brady, 430 U.S. 274, 288-89 n.15 (1977) (emphasis added). The plaintiff states submit that such scrutiny here mandates the conclusion that the First Use Tax be held on its face to discriminate against interstate commerce.

[14] See also the detailed comments, which were apparently illustrated by charts, of the First Use Tax's principal sponsor, demonstrating that every conceivable Louisiana group which would otherwise be subject to the First Use Tax was protected by exemption or credit from it. Hearings of H.B. 768, Senate Committee on Revenue and Fiscal Affairs (June 26, 1978) at 3-4 (Testimony of Mr. Tauzin).

The Special Master specifically recognized that the Louisiana tax discriminates in favor of domestic interests at the expense of burdening interstate commerce. The only industries excluded from the tax are "all within the State." Report at 33. The credit against the First Use Tax for severance taxes paid by domestic producers was seen to result in a greater tax burden on foreign firms and consumers. For example, the Special Master acknowledged:

> [The Severance Tax Credit] obviously aids an intrastate operation in a way not available to a pipeline engaged only in interstate transportation or producing gas outside of Louisiana.

Id. at 34. The Special Master also expressly adopted the Federal Government's description of the taxing scheme and the benefits accorded in-state businesses:

> This difference can be illustrated by the following example. Owner A has 1000 mcf of OCS gas; owner B has 500 mcf of OCS gas and 500 mcf of gas subject to Louisiana's severance tax. A owes $70 of first use tax; B owes $35 of first use tax and $35 in severance tax. B, however, pays only $35 in first use taxes. He owes no severance tax because he can credit the first use payment against the severance tax liability.

Id. at 34 n.18 (quoting from Brief of the United States and the FERC at 51 n.47). In short, the Special Master rejected Louisiana's claim that the tax "does not discriminate," concluding:

> Louisiana customers of local utilities and local consumers buying directly from the pipelines are protected in whole or in part from the incidence of the tax which is passed on to consumers out of the State.

Id. at 34. The Report of the Special Master is thus replete with observations of the facially discriminatory nature of the First Use Tax.

Despite these observations, the Special Master declined to recommend this Court find that the First Use Tax on its face discriminates against interstate commerce. The plaintiff states submit that this failure so to recommend results from two fundamental errors in the Special Master's analysis.

First, the Special Master erred in finding that an evidentiary hearing is appropriate to determine "what adjustments can be made in the base prices, and what allowances can be made between buyers and sellers which might reduce or eliminate any disadvantage of one over the other." Report at 35. This view has no legal basis. For this Court has never required an interstate business to adjust its prices or make allowances to its customers to rectify a competitive imbalance created by a state tax. Rather, the inquiry has been whether the taxing scheme under consideration will operate, of itself, to discriminate against interstate commerce.

This Court has recognized that a tax, which when considered in the overall taxing scheme appears on its face to be non-discriminatory, may still be held unconstitutional if the tax through its practical operation effectively discriminates against interstate commerce. *See, e.g., Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64 (1963). More important for the present case, however, is this Court's recognition that an examination of practical operation is not necessary or warranted if the statute is unconstitutionally discriminatory on its face. *See, e.g., Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977). Since a determination of facial invalidity can be made by considering the statute in question and its companion statutes, there is obviously no need for factual development, and thus the present case can and should be resolved on the pleadings.

The second error in the Special Master's analysis is his determination that a hearing is appropriate because "the 'actuality of operation' may show that the tax is a 'compensating' tax intended to complement the State severance tax as the use tax complemented the sales tax in *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937)." Report at 35. This conclusion is incorrect — no evidentiary hearing is necessary on this matter because the determination of whether or not the First Use Tax is a "compensating" tax with respect to the state Severance Tax is a decision that can and should be made as a matter of law from a consideration of the respective statutes and their purposes.

For example, in the case upon which the Special Master relies, *Henneford v. Silas Mason Co.*, 300 U.S. 577, 581 (1937), a use tax was found constitutional because it accomplished the traditional role of a use tax, *i.e.*, to complement a sales tax by ensuring that the same activities, purchases at retail, were subject to the same tax burden, regardless of where the purchase was made, thereby placing the same in-state and out-of-state activities on an equal competitive footing.

The First Use Tax is clearly not such a compensating tax with respect to the Louisiana Severance Tax. The First Use Tax is imposed on federal OCS gas when it is first subjected to one of the activities defined as "uses" in the statute, while the Severance Tax is imposed on Louisiana gas as a result of a totally different activity — the severing of such gas from the soil or water bottoms of the state. Furthermore, the purposes underlying the two taxes are very different. The Severance Tax is "an excise tax upon the privilege of severing resources" from within Louisiana's borders, and is based upon the state's "inherent power . . . to regulate the severance of its natural resources." *State v. Standard Oil Co. of Louisiana*, 178 So.

601, 626 (La. 1938). The stated purposes of the First Use Tax, on the other hand, are:

> to require the exaction of fair and reasonable compensation to the citizens of this state for the costs incurred and paid with public funds, which costs enure solely to the benefit of the owners of natural gas produced beyond the boundaries of Louisiana, although introduced into the state, and to provide some measure of reimbursement to the citizens for damages to the state's water bottoms, barrier reefs, and sensitive shorelands as a direct comsequence of activity within the state associated with such natural gas by the owners thereof.

La. Rev. Stat. Ann. § 47:1301(C). The Severance Tax does not seek to compensate the state for the extra costs incurred and paid with public funds for benefits which enure only to the owners of the gas or oil. Nor does the Severance Tax seek to compensate the state for damages to the state's water bottoms, barrier reefs, and sensitive shorelands as a direct consequence of activity within the state. Likewise, the First Use Tax is not designed to compensate the state for the depletion of its natural resources.

Finally, the First Use Tax does not have the salutary effect typical of "compensatory" taxes, *i.e.*, preventing residents of the taxing state from escaping sales tax liability by purchasing goods from out-of-state retailers. In the usual case, a compensating use tax prevents residents who make out-of-state purchases from getting a "free ride" at the expense of residents who purchase their goods in-state. Both purchasers receive governmental services, but without the compensating tax only the in-state purchasers would pay for those services with their taxes. No such compensating result is achieved by the First Use Tax since it is designed to be passed on to residents of other states. Rather, the First Use Tax reverses the result: *out-of-state consumers who receive no*

governmental services from Louisiana bear the brunt of the tax; people who receive Louisiana's governmental services pay no tax whatever.

The plaintiff states are not aware of any case that has considered whether a use tax can complement and compensate for any tax other than a sales tax. However, this Court has recognized that, even in a true use tax-sales tax situation, the use tax must be applied so as to equalize the competitive positions of taxpayers similarly situated. *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64, 70 (1963). There, the Court articulated the test for the validity of a valid use or compensating tax:

> Equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state.

The *Halliburton* court found it impermissible to justify the imposition of a use tax by comparing the activities of a manufacturer-user to those of a purchaser at retail. Similarly, Louisiana cannot legally justify the imposition of the First Use Tax by comparing the interstate transportation of federal OCS gas by the pipeline companies to the severance of oil and natural gas from the state's domain by oil and gas producers.

It should be noted that the Special Master permitted Louisiana to file an offer of proof indicating the purported necessity for an evidentiary hearing. The plaintiff states responded to Louisiana's proffer by demonstrating that the "evidence" to be offered consisted of purely legal arguments, irrelevant or immaterial points, and a handful of items capable of judicial notice. The Special Master cited not one iota of alleged evidence from Louisiana's proffer to justify recommending denial of judgment on the pleadings. Louisiana is not even prepared, therefore, to justify its unconstitutional tax on the points discussed by the Special Master.

Thus, for all of these reasons, the Special Master erred in concluding that evidence was needed to determine whether "actuality of operation" shows that the First Use Tax operates as a complement to the Severance Tax. As demonstrated above, the First Use Tax cannot, as a matter of law, be deemed to be a compensating tax that complements Louisiana's Severance Tax.

B. The First Use Tax is not fairly apportioned.

The First Use tax is not fairly apportioned because it is not related to the taxpayer's investment in facilities, actual business activities, gross receipts, payroll, or any other identifiable activity within the State of Louisiana. The tax is a tax on federal OCS gas, not on local activities. This Court in recent years has approved a tax as apportioned properly only when the tax was levied solely on the *value* of an *identifiable activity* that occurred *within* the state. *Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734 (1978); *Complete Auto Transit, Inc v. Brady,* 430 U.S. 274 (1977). Here the First Use Tax is not in any way apportioned to any activities occurring in Louisiana. Rather the tax is measured by the *total volume* of the natural gas shipped in interstate commerce through Louisiana.

The Special Master, however, found that this "fair apportionment requirement" has no application here because:

> Just as a sales tax, or a severance tax, is imposed on the total amount of the commodity sold or produced, so it would seem appropriate to levy a use tax on the total amount involved.

Report at 36. This conclusion ignores the "beggared" nature of the definition of "use" in the First Use Tax. *Cf. Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157,

161 (1954). Unlike severance and use taxes, where the taxable event typically can occur *only once* so that taxing the total amount of the commodity does not create a risk of multiple taxation, there is no such limitation upon the occurrence of "uses" as defined in First Use Tax. Rather, other than those limited "uses" that involve actual consumption or utilization of the gas within Louisiana (which, as already shown, are exempt from First Use Tax by virtue of the exemptions, exclusions, and credits provided), any one or more of several of the other "uses" as defined in First Use Tax clearly can and probably does occur in one or more of the several states through which the gas travels in its interstate journey beyond Louisiana to ultimate consumers. For example, the pipeline companies typically sell gas to distribution companies to which they transfer possession or relinquish control at the point of delivery — both the "sale" and "transfer of possession or relinquishment of control at a delivery point in the state" are "uses" under the First Use Tax that typically do occur again in other states.

The Special Master may have recognized some of the difficulty, suggested above, in holding "fair apportionment" is inapplicable in the case at hand, for in the very next paragraph of his Report he discusses at length the leading fair apportionment case, expressly recognizing that it is "[p]robably the case which on its facts is closest to this one . . . ." Report at 36. That case, *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 159 (1954), is indeed markedly similar to the present case. Thus, it is noteworthy that there this Court held the tax unconstitutional precisely because it would "permit a multiple burden" on interstate commerce. *Id.* at 170. Texas had levied a tax on the entire volume of natural gas "gathered" within the state, and "gathering" was, the Court noted, "artificially defined" as the first taking or first retaining of possession of such gas. *Id.* at 164. Accordingly, the Court

held that "if Texas may impose this 'first taking' tax measured by the total volume of gas so taken, then Michigan and the other recipient states have at least equal rights to tax the first taking or 'unloading' from the pipeline of the same gas when it arrives for distribution." *Id.* at 170. Furthermore, "Oklahoma might then seek to tax the first taking of the gas as it crossed into that state" and the "net effect would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate." *Id.* No facts were presented by the taxpayer to support this multiple burden argument. Rather, the Court was satisfied that the activity taxed was *so closely related to interstate commerce that the risk of multiple taxation was not constitutionally permissible.*[15]

Here, as demonstrated above, the activities taxed, *i.e.*, the "uses," are similarly so closely related to interstate commerce that the risk of multiple taxation is simply not constitutionally permissible. The Special Master suggests that because, in his view, there is a "dispute among the parties as to the legal effect of the "processing' use," judgment on the pleadings is not possible. Report at 37. This finding is simply wrong. First, the Special Master's conclusion that there is a legitimate dispute between the parties as to this issue seems to be squarely at odds with his earlier correct holding that "gas which is produced from the outer continental shelf, brought ashore by the pipelines, *processed* in plants which remove pollutants . . . , delivered to interstate pipelines and transported out of the State" is "during the entire journey" in interstate commerce. *Id.* at 31, 32 (emphasis added). Moreover, even if there is a legitimate dispute as to whether the "processing use" is or is not in interstate commerce, it is,

[15] It is crystal clear that this analysis in *Michigan-Wisconsin* is still controlling and thus applicable here, for this Court specifically approved it recently. Department of Revenue of Washington v. Association of Washington Stevedoring Companies, 435 U.S. 739, 749 n.18 (1978).

as the Special Master himself conceded, a "legal" dispute, and this in no way prevents this Court from determining, as a matter of law, that the definition of "uses" here, like that of "gathering" in *Michigan-Wisconsin,* is a "beggared" definition and so the risk of multiple taxation is impermissible. Indeed, even if the gas is not subject to processing in other states, the First Use Tax is unconstitutional since, as is demonstrated above, the same type of activity having the same relation to the gas, clearly could occur in all the other states through which the gas is transported.

For all of these reasons, the Special Master erred in concluding that an evidentiary hearing is necessary to determine whether the First Use Tax is fairly apportioned.

CONCLUSION

The Louisiana First Use Tax poses a real threat to the free course of interstate commerce. This contest does not concern a tax levied on gas from property of the State of Louisiana; the tax is assessed only on gas derived from federal enclaves within Louisiana or from the federal domain on the outer continental shelf. Louisiana seeks to surcharge the transportation of a commodity originating outside Louisiana and merely passing through its boundaries. At all times the purpose of the tax is to favor Louisiana interests at the expense of other states, regions, and peoples of this nation. The "evil of protectionism" in this case is patent. *See Philadelphia v. New Jersey,* 437 U.S. 617, 626 (1978). Indeed, the Special Master himself repeatedly recognized the discrimination.

The Louisiana First Use Tax raises the spectre of balkanization. If one state can tax a commodity in interstate commerce without apportionment and to the benefit of its in-state interests, then each state may similarly burden that commerce. This Court should strike

down Louisiana's dangerous impediment to the free flow of trade.

Moreover, the First Use Tax is a carefully contrived effort by a single state to tax the interstate transportation and sale of natural gas, an area within the exclusive jurisdiction of the federal government. It is an attempt to exploit out-of-state consumers with excessively high prices, usurp the power of the FERC with regulation masked as taxation, and hinder the development of gas from the outer continental shelf by imposing a tax that federal law expressly prohibits. Accordingly, the First Use Tax patently violates the Supremacy Clause of the Constitution and must be enjoined.

For each and all of these reasons, and for those appearing in their brief in support of the motion for judgment on the pleadings, the plaintiff states urge that their exceptions be sustained and that the Court enter a decree granting judgment as prayed for in the complaint, i.e., declaring and adjudging, pursuant to 28 U.S.C. § 2201 (1976), that the Louisiana First Use Tax is unconstitutional and unenforceable with respect to natural gas transported or sold in interstate or foreign commerce; issuing a permanent injunction prohibiting the defendant and its agents and employees from collecting the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce; ordering that any and all revenues collected pursuant to the First Use Tax with respect to natural gas transported or sold in interstate commerce be refunded to the taxpayers together with interest earned thereon; and granting the plaintiff states

their costs herein expended and such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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APPENDIX

The Times-Picayune/The States-Item

Tuesday, October 7, 1980 Section 1, Page 17

1st-Use Tax Will Profit La. Even If Cash Is Returned

by CHARLES M. HARGRODER
Capital Bureau

BATON ROUGE — Louisiana stands to profit from its "first-use" tax on off-shore gas passing through the state whether or not the U.S. Supreme Court upholds the constitutionality of the tax, two state officials said Monday.

Receipts from the first-use tax are being held in escrow pending a Supreme Court decision on a suit by eight states contesting its legality. Should the court rule against Louisiana, the state would have to return the money and pay an additional 6 percent interest to those who paid the tax.

However, state Treasurer Mary Evelyn Parker said more than $364 million in receipts from the tax has been invested since April 1, 1979, when the tax became effective, at interest rates higher than 6 percent. The state thus will profit from the tax even if the court orders that the money be reimbursed with interest, Parker said.

She said that first proceeds of the tax were invested in August, 1979. Through September this year, total receipts of taxes — $364,037,997.23 — had earned $17,597,967.89.

At 6 percent for about one year's investment, earnings would figure roughly $12.9 million. So, if the state had to return principal and interest of 6 percent, it would still retain almost $4.7 million — earnings above the 6 percent rate.

Attorney General William J. Guste Jr. said interest on the money so far has averaged between 8 and 14 percent.

The state is gambling that it will get to keep it all, and continue to reap tax income from offshore wells.

The state imposes a tax of 7 percent on each 1,000 cubic feet of natural gas pumped onshore from federal leases.

Guste said that, even if the state loses its case before the high court, the decision may provide the state with guidelines on writing a law that could pass the test of constitutionality.

Monday, the high court agreed in Washington to study expanding the lawsuit.

The justices said they will hear arguments over requests by New Jersey, the federal government and 17 natural gas pipeline companies to intervene in the case.

The court also will consider whether the case should be decided on written briefs already submitted,

(continued)

or allow a special master to gather more evidence.

Last June 18, eight states — Illinois, Indiana, Maryland, Massachusetts, Michigan, New York, Rhode Island and Wisconsin — won permission to sue Louisiana in the Supreme Court without first airing their complaint in a lower court.

The Constitution empowers the court to invoke its "original jurisdiction" in resolving certain disputes between states without waiting for lower court rulings.

Such cases often take years to resolve, and last March 3, the court appointed Washington, D.C., lawyer John Davis as a special master in charge of gathering facts and making recommendations to the justices.

He has not yet made any recommendations on the merits of the suit. But after studying the intervention requests, Davis recommended that the list of plaintiffs suing Louisiana be expanded.

In addition, he recommended that the Associated Gas Distributors be allowed to enter the case as a friend-of-the-court in support of striking down the Louisiana tax. That recommendation also was scheduled for argument.

The treasurer invests the first-use money in short-term U.S. Treasury obligations and in certificates of deposit with Louisiana banks.

The 1978 Legislature created the first-use tax as a means of compensating the state for government expenses incident to offshore production beyond state limits.

Louisiana already collects a severance tax on production on state-owned water bottoms off the coast, just as it does from inland production.

The Legislature maintains that the state faces financial obligations resulting from production on federal lands from which the state receives no compensation — such things as additional education costs for children of offshore workers, additional usage of roads and bridges, law enforcement and a number of public programs.

Guste said the Supreme Court will be asked to decide on two contested recommendations by the master they named to hear the case:

—Whether the Supreme Court or state courts have original jurisdiction. Louisiana says it is a matter for state courts in that it is a question of its own citizens — the pipelines — contesting a state tax. Eight other states say that suits of one state against another lie within the Supreme Court's jurisdiction, and as ultimate consumers they are plaintiffs against Louisiana.

—Whether the law is unconstitutional as an impediment to interstate commerce, and because federal law assigns pricing of natural gas to the Federal Energy Commission.

The longer litigation lasts, however, the more taxes Louisiana collects, escrows, invests, and benefits.

Number 83, Original

IN THE

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OCTOBER TERM, 1980

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

versus

STATE OF LOUISIANA,

Defendant

EXCEPTIONS OF THE STATE OF LOUISIANA TO THE REPORT OF SPECIAL MASTER, DATED SEPTEMBER 15, 1980, AND BRIEF IN SUPPORT THEREOF

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STATE OF WISCONSIN,

Plaintiffs

versus

STATE OF LOUISIANA,

Defendant

EXCEPTIONS OF THE STATE OF LOUISIANA TO THE REPORT OF THE SPECIAL MASTER DATED SEPTEMBER 15, 1980

The State of Louisiana, the defendant herein, excepts to the Special Master's Report dated September 15, 1980, in the following respects:

Exception No. 1

The State of Louisiana excepts to the Special Master's recommendation that the State of Louisiana's Motion to Dismiss the Complaint be denied.

Exception No. 2

The State of Louisiana excepts to the Special Master's failure to recommend that the Complaint be dismissed on the ground that the pending tax refund suit filed by the pipeline company taxpayers in the Louisiana state courts provides "an appropriate forum in which the *issues* tendered here may be litigated," *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976), thus making it unnecessary for the Court to exercise any original jurisdiction it may have in this case.

Exception No. 3

The State of Louisiana excepts to the Special Master's failure to recommend that the Complaint be dismissed on the ground that the plaintiff States have no standing, either as proprietary users of natural gas or as *parens patriae* of their gas-consuming citizens, to protest the constitutionality of the Louisiana First Use Tax, LA. Rev. St. 47:1301-1307, as applied to private pipeline taxpayers that in turn pass on to consumers the cost of the tax.

Exception No. 4

The State of Louisiana excepts to the Special Master's failure to recommend that the Complaint be dismissed on the ground that the Complaint does not allege any cause of action or controversy "between two or more States" within the contemplation of Article III of the Constitution or 28 U.S.C. §1251 (a) (1), thus depriving this Court of original jurisdiction over the cause.

Exception No. 5

The State of Louisiana excepts to the Special Master's failure to recommend that the Complaint be dismissed on the ground that this Court's original jurisdiction should not be invoked so as to interfere with the administration of the Louisiana First Use Tax statute, particularly before the Louisiana state courts have had an opportunity to give the statute an authoritative construction, interpretation and application.

Exception No. 6

The State of Louisiana excepts to the Special Master's failure to recommend that the Complaint be dismissed on the ground that the plaintiff States seek to invoke the original jurisdiction of this Court merely to litigate, as volunteers, the tax and constitutional claims of the real parties in interest, the private pipeline taxpayers upon whom the legal incidence of the Louisiana First Use Tax directly falls.

Exception No. 7

The State of Louisiana excepts to all the Special Master's findings of fact and conclusions of law with respect to the foregoing six exceptions, except his finding of fact that:

> Louisiana is, of course, correct in its assertion that no tax is directly imposed by it on the plaintiff States. At no time are

they called on to remit funds to Louisiana; they and their citizens pay the pipelines which are liable for the first use tax.

Exception No. 8

With respect to the Special Master's recommendation that the plaintiffs' Motion for Judgment on the Pleadings be denied "without prejudice to a reconsideration of the issues raised on the basis of further proceedings," the State of Louisiana hereby reserves the right to file exceptions, if any, to the findings of fact and conclusions of law underlying said recommendation until such time as the State of Louisiana files its replies to any exceptions of the plaintiffs to that recommendation.

Respectfully submitted,

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STATE OF LOUISIANA,

Defendant

BRIEF IN SUPPORT OF THE EXCEPTIONS OF THE STATE OF LOUISIANA TO THE REPORT OF THE SPECIAL MASTER DATED SEPTEMBER 15, 1980

STATEMENT OF THE CASE

On March 29, 1979, the eight plaintiff States moved for leave to file a complaint against the State of Louisiana. The proposed complaint sought (1) a declaration that the Louisiana First Use Tax "is unconstitutional and unenforceable with respect to natural gas transported or sold in interstate or foreign commerce;" (2) preliminary and permanent injunctions prohibiting Louisiana from collecting that tax; and (3) an order "that any and all revenues collected pursuant to the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce be refunded to the taxpayers together with interest thereon."

Paragraph I of the proposed complaint asserted that

> The exclusive original jurisdiction of this Court is invoked under the Constitution of the United States, article III, section 2, clauses 1 and 2 ("Controversies between two or more States"), and 28 U.S.C. §1251 (a) (1) (1976). Plaintiffs have no other plain, speedy or adequate remedy at law and have no remedy whatsoever in any other federal court.

In Paragraph III of the complaint it was further alleged that

> Plaintiffs bring this action in their proprietary capacities as substantial purchasers of natural gas upon which the [Louisiana] First Use Tax will be imposed, and in those capacities will sustain substantial monetary damages as a result of the First Use Tax. Plaintiffs also bring this action in their *parens patriae*, or quasi-sovereign capacities, as guardians of the health, welfare and prosperity of the citizens of Maryland, Illinois, Indiana, Massachusetts, Michigan, New York, Rhode Island, and Wisconsin.

Louisiana responded to the motion for leave to file by a brief in opposition that challenged not only the substantiality of the federal constitutional issues respecting the First Use Tax but also the standing of the plaintiff States to raise those issues. Standing was questioned from the standpoint of the plaintiffs' alleged proprietary capacities as gas consumers and their alleged *parens patriae* representation of their citizens. Louisiana further urged

that maintenance of this action was precluded by the prudential abstention doctrine reflected in *Arizona v. New Mexico*, 425 U.S. 794 (1976).

Thereafter the United States and the Federal Energy Regulatory Commission, as *amici curiae*, filed a brief asserting that the plaintiff States did have standing and that the case was otherwise appropriate for the exercise of original jurisdiction. The Arizona case was distinguished *inter alia* because in the instant situation there was — at the time the *amici* brief was filed — no pending suit in any other court that was thought to be "an appropriate vehicle" for the decision of the constitutional issues raised by the plaintiff States.[1]

On June 18, 1979, this Court entered an order that simply granted the motion for leave to file the bill of complaint and gave the State of Louisiana sixty days to answer. No mention was made of the objections raised by Louisiana. Nor was there any finding or determination that the plaintiff States had standing to raise their constitutional objections to the First Use Tax or that this Court's original jurisdiction had been properly invoked.

On August 17, 1979, Louisiana filed an answer to the complaint, accompanied by a motion for the appointment of a Special Master. The answer addressed each paragraph of the complaint, specifically denying the allegations of jurisdiction in Paragraph I of the complaint and the allegations of standing in Paragraph III "either in their proprietary capacity or as *parens patriae* on behalf of their respective citizens." Paragraph LXVII of the answer recited the additional allegation that "plaintiff states are without standing to institute and prosecute this action, and this Court has no original jurisdiction of this cause, all for the reasons set forth in Louisiana's brief in opposition to plaintiffs' motion for leave to file complaint herein."

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[1]In the *Arizona* case, 425 U.S. at 796, it appeared that a declaratory judgment action had been filed by three Arizona utilities in a New Mexico state court prior to Arizona's filing of its motion in this Court to file a bill of complaint. That state court action raised the same constitutional issues that Arizona sought to raise in this Court.

This paragraph of the answer also asserted that the plaintiff States "have other judicial remedies available to them by way of intervention in pending legal proceedings in the courts of Louisiana through which the issues sought to be raised here may be fully litigated and, if necessary, ultimately brought to this Court by direct appeal."

The "pending legal proceedings in the courts of Louisiana" referred to in Paragraph LXVII of the answer related to the filing in a Louisiana state court on June 22, 1979—just four days after this Court granted leave to file the plaintiff States' complaint — of a tax refund suit by the seventeen private pipeline companies. That suit alleged that the Louisiana First Use Tax was unconstitutional for precisely the same reasons that are asserted before this Court by the plaintiff States. *Southern Natural Gas Co., et al. v. McNamara, Louisiana Department of Revenue and Taxation and the State of Louisiana*, Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana, Number 225,533.[2] The Federal Energy Regulatory Commission had required that the natural gas pipeline companies — the taxpayers — institute an appropriate refund proceeding in the Louisiana courts as a prerequisite to the Federal Energy Regulatory Commission permitting the First Use Tax to be passed on to their consumers.[3]

On August 28, 1979, the seventeen pipeline companies upon whom Louisiana's First Used Tax is levied filed a motion for

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[2]The petition in that tax refund suit has been reproduced in full (pp. A-1 to A-11) in the Appendix to Louisiana's Brief in Response to Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae, filed in this Court on December 5, 1979.

[3]State of Louisiana First Use Tax in Pipeline Rate Cases, Docket No. RM 78-23, Order No. 10, "Order Establishing Procedures Governing Pipeline Recovery of the State of Louisiana First Use Tax," issued August 28, 1978, 43 Fed. Reg. 45,553 (October 3, 1978); Order No. 10-A, "Order on Rehearing, Modifying Prior Order, Amending Regulation and Requesting Comment," issued December 20, 1978, 43 Fed. Reg. 60,438 (December 28, 1978), Appeal Docketed, Tennessee Gas Pipeline Company v. Fed. Energy Regulatory Commission, No. 78-38-13, et al. (4th Cir., December 26, 1978); and Order No. 10-B, "Order on Rehearing. Modifying Prior Order and Amending Regulations." Issued March 2, 1979, 44 Fed. Reg. 13,460 (March 12, 1979).

leave to intervene as plaintiffs in this Court and to file a complaint. The proposed complaint, attached to the motion, asserted in its first paragraph that leave was being sought "to file this Complaint in Intervention pursuant to article III, §2, clauses 1 and 2 of the Constitution of the United States ('Controversies ... between a State and Citizens of another State'); Rule 9 of this Court; and Rule 24 of the Federal Rules of Civil Procedure." Paragraph 10 of the proposed complaint stated that each intervenor had timely instituted suit in the Louisiana state court (the aforementioned case No. 225,533) to recover from the State of Louisiana all First Use Taxes that had been paid each month under protest. The proposed complaint then proceeded to allege the identical constitutional defects in the First Use Tax statute that had been asserted by the plaintiff States in their complaint on file in this Court and by the same seventeen pipeline companies in their tax refund petition on file in the Louisiana state court.

On September 18, 1979, the eight plaintiff States filed a motion for judgment on the pleadings. That motion was later supported by the United States and the Federal Energy Regulatory Commission as *amici curiae*. The seventeen pipeline companies, whose motion to intervene and to file a complaint lay unacted upon by the Court, filed a separate motion for leave to file their own motion for judgment on the pleadings, with accompanying brief in support thereof.

In the meantime, on October 22, 1979, the State of Louisiana filed a motion to dismiss the complaint of the plaintiff States, combined with a supporting brief and a brief in opposition to the pending motion of the plaintiff States for judgment on the pleadings. This motion to dismiss renewed and expanded the jurisdictional and prudential objections that Louisiana had expressed in its earlier opposition to the motion for leave to file the complaint, objections which had been restated in Louisiana's answer to the complaint. Special emphasis was given to the newly-demonstrated availability of an alternative forum in the Louisiana state courts wherein the identical constitutional issues

were being raised and pursued. This was said to put this case on all fours with the abstention situation before this Court in the *Arizona v. New Mexico* litigation. Emphasis was also given to the total absence of any real sovereign interest in the plaintiff States, other than that of being gas consumers; it was becoming increasingly clear, said Louisiana, that the plaintiff States were simply volunteering to pursue the tax refund claims of the private taxpayers, the seventeen pipeline companies.

In response to Louisiana's motion to dismiss, the plaintiffs' brief in opposition asserted (p. 6) that this Court's June 18 order, which had merely allowed the complaint to be filed, constituted an acknowledgment of the standing of the plaintiff States to bring this original action, inasmuch as the Court had "acted in the face of Louisiana's brief in opposition" to the filing, "which urged that the plaintiff states lacked standing." This Court, said the plaintiff States, "should not reverse its decision acknowledging the standing of the plaintiff states to bring this suit" (p. 6).

As to Louisiana's prudential objections in its answer and motion to dismiss, relative to the recently filed tax refund suit in the Louisiana state courts, the plaintiff States' opposition brief (pp. 6-7) asserted that the Court's June 18 order reflected a considered rejection of Louisiana's claim in this respect. That order, reiterated the brief (p. 7), constituted "this Court's decision to exercise its original jurisdiction."

On October 22, 1979, the State of New Jersey filed a motion for leave to intervene as a party plaintiff, alleging in its proposed complaint facts and issues comparable to those in the complaint of the eight plaintiff States. Louisiana duly filed an opposition to this motion.

Out of this welter of complaints, answers, motions, oppositions, and briefs, not all of which have been described herein, came this Court's order of March 3, 1980. That order granted Louisiana's motion to appoint a Special Master and appointed the Honorable John F. Davis as the Special Master. The Court thereby referred all pending matters to the Special Master.

The Special Master invited briefs and statements from all concerned respecting the efforts of the private pipeline companies and the State of New Jersey to intervene as parties plaintiff and to file separate complaints. After being urged to do so by the Special Master,[4] the United States and the Federal Energy Regulatory Commission abandoned their *amici* stance and filed their own motion for leave to intervene as plaintiffs and to file an attached Complaint in Intervention. This complaint sought to invoke the jurisdiction of this Court "under Section 1251 (b)(2) of Title 28 of the United States Code." Like the complaint of the plaintiff States, this complaint in intervention requested a declaration of the constitutional invalidity of Louisiana's First Use Tax statute, as well as an order that all revenues collected pursuant to that statute "be refunded to the taxpayers together with interest thereon." The complaint, apparently unable to assert what relief the interests of the United States necessitated, merely requested that the Court "grant such relief as the Court may deem appropriate and necessary to protect the interests of the United States and the Federal Energy Regulatory Commission."

At a hearing held on March 21, 1980, the Special Master requested a Proffer of Proof by the State of Louisiana as to the facts that Louisiana considers to be in dispute and thus necessary to be proved should an evidentiary hearing be scheduled to determine the constitutional issues arising under the Commerce Clause, the Supremacy Clause, the Import-Export Clause, the Contract Clause and the Equal Protection Clause. On April 15, 1980, Louisiana filed its Proffer of Proof.

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[4]At the hearing held on March 21, 1980, the Special Master stated to Government counsel (Tr. 85) that if the time comes "when you feel you want to participate in this case, you are not going to be able to just tell me you want to participate in the case. We will have the delay of getting a report to get it to the Court and getting the Court to act on it. I can't grant you intervention in the case. All I can do is recommend to the Court ... You may be in trouble and we can't get you in just overnight."

To that statement, Government counsel responded: "I understand, and I think the United States will take steps to protect itself" (Tr. 85).

On May 14, 1980, the Special Master filed his interim report respecting motions for leave to intervene and to appear as *amici curiae*. The Special Master therein recommended that the State of New Jersey, the United States and the Federal Energy Regulatory Commission, and the seventeen pipeline taxpayers all be allowed to intervene as parties plaintiff. To each of these motions there was attached a complaint raising the same constitutional issues contained in the complaint of the plaintiff States, as well as in the complaint of the seventeen pipeline companies in their tax refund suit in Louisiana. On July 9, 1980, Louisiana filed Exceptions to the Special Master's interim report with a brief in support of the Exceptions.

Arguments were held on June 19, 1980, before the Special Master relative to Louisiana's motion to dismiss the complaint filed by the plaintiff States, as well as the plaintiff States' motion for judgment on the pleadings. On September 15, 1980, the Special Master filed his Report on these two motions.[5]

To be precise, the State of Louisiana is involved in twelve judicial proceedings. In each of these proceedings the same five constitutional objections as to the validity of the First Use Tax statute are at issue.

FEDERAL PROCEEDINGS

(1-4) Before this Court in the instant case, one complaint has been filed by the eight Plaintiff States. The Special Master has recommended that three sets of parties be allowed to intervene (New Jersey, the United States and Federal Energy Regulatory Commission, and seventeen pipeline companies). Proposed complaints are attached to the three intervention motions.

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[5]This Report of the Special Master has been reproduced in full [pp. A-1 to A-33] in the Appendix.

(5) A complaint was filed by the Federal Energy Regulatory Commission against Shirley McNamara, et al., in the Middle District of Louisiana, Civil Action 78-384. A motion to stay was granted. See opinion reproduced in the Appendix to the Motion to Dismiss and Brief in Support of Motion to Dismiss and in Opposition to Motion for Judgment on the Pleadings, filed by the defendant in this Court on October 22, 1979. The matter was appealed to the Fifth Circuit and there docketed as No. 79-1403. On the day of argument, the matter was stayed.

STATE PROCEEDINGS

(6) On September 22, 1978, Edwin W. Edwards, et al., filed a petition for declaratory relief, naming as defendants, among others, all of the pipelines doing business in Louisiana. All of these pipelines, except Mississippi River Transmission Corporation, filed a reconventional demand (cross-claim), asserting these constitutional grounds. The pipeline companies removed the case to the federal court where a motion to remand was granted. (464 F. Supp. 654, USDC MD LA. 1979).

(7) A petition was filed on May 29, 1979, by Arkansas Louisiana Gas Company against Shirley McNamara, et al., under Docket Number 224,695, Division J, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana.

(8) The seventeen pipeline companies filed a petition, for refund of taxes paid under protest, against Shirley McNamara, et al., on the 22nd day of June, 1979, under Docket Number 225,533, Division D, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana. Pertinent parts of this petition may be found in the Appendix to the Brief of the State of Louisiana in Response to Brief of the United States and the Federal Energy Regulatory Commission as *Amici Curiae*, filed herein on December 5, 1979.

(9) A petition was filed by Pennzoil Oil & Gas, Inc. against Shirley McNamara, et al., on the 27th day of June, 1979, under Docket Number 225,649, Division D, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana.

(10) A petition was filed by Pogo Producing Company against Shirley McNamara, et al., on the 27th day of June, 1979, under Docket Number 225,650, Division H, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana.

(11) A petition was filed by Pennzoil Louisiana and Texas Offshore, Inc., against Shirley McNamara, et al., on the 27th day of June, 1979, under Docket Number 225,651, Division F, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana.

(12) A petition was filed by Nicor Supply Inc., against Shirley McNamara, et al., on the 10th day of July, 1980, Docket Number 237,522, Division J, Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana.

As noted, these seven state court proceedings have all been filed in the same court, the Nineteenth Judicial District Court, East Baton Rouge Parish, Louisiana. These cases are all in the discovery stage. A motion for consolidation has been filed because the same issues respecting the constitutionality of the Louisiana First Use Tax on Natural Gas, LA. Rev. St. 47:1301-1307, have been raised in each case. And, in each of these cases the alleged grounds of unconstitutionality are identical to those asserted here. The state trial judge who would handle the consolidated cases has stated, and the local rules of court provide, that upon certification by counsel as to the completion of discovery, a pretrial conference and order would be entertained for the purpose of setting the case for trial.

The plaintiff States have made no effort to intervene or otherwise participate in any of these state court proceedings. No Louisiana statute or rule of practice prevents a sovereign State from intervening or otherwise participating in the Louisiana proceedings, provided only that the States allege an interest. LA. C.C.P. art. 1091.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, clauses 1 and 2, of the Constitution provide in relevant part:

> The judicial Power shall extend ... to Controversies between two or more States ... .
>
> In all Cases ... in which a State shall be Party, the supreme Court shall have original Jurisdiction.

The Eleventh Amendment of the Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

28 U.S.C. §1251 (a) (1) provides:

> (a) The Supreme Court shall have original and exclusive jurisdiction of:
>
> (1) All controversies between two or more States;

ARGUMENT

I.

THE COMPLAINT SHOULD BE DISMISSED BECAUSE THERE IS AN APPROPRIATE STATE COURT FORUM IN WHICH THE CONSTITUTIONAL ISSUES HERE TENDERED MAY BE LITIGATED

There is presently pending in the Nineteenth Judicial District Court of Louisiana, Parish of East Baton Rouge, a tax refund suit brought against the Louisiana First Use Tax authorities by the same seventeen pipeline companies that are seeking to intervene as parties plaintiff in the original proceeding before this Court. That tax refund suit is entitled *Southern Natural Gas Co., et al. v. McNamara, Louisiana Department of Revenue*

and Taxation and the State of Louisiana, No. 225,533. The pipeline companies premise their refund demands on the identical five constitutional issues raised by the eight plaintiff States in this original proceeding, thus guaranteeing that the constitutional issues will be fully developed and litigated in the Louisiana state courts. A chart exhibiting the complete identity of issues in the two proceedings appears at page 18 of the Brief in Support of Motion to Dismiss, filed by the State of Louisiana in this Court on October 22, 1979.[6]

The pendency of the tax refund suit in the Louisiana courts is a decisive and controlling consideration at this juncture of the original action instituted in this Court. Such pendency makes it "inappropriate for this Court to attempt to adjudicate the issues [Maryland, et al.] seeks to present." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 501 (1971). It is inappropriate because there is in fact a "pending state-court action [that] provides an appropriate forum in which the *issues* tendered here may be litigated." *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) [emphasis in original].

A. The Special Master's Report

The Special Master's Report, to be sure, acknowledges (p. 15 [A—14]) that this Court "can, and will, refuse to accept jurisdiction of a cause when there are other and better ways of resolving the dispute." But that Report, after reviewing the "other ways" of resolving this dispute and attempting to distinguish the precedential value of *Arizona v. New Mexico*, concludes (pp. 19-20 [A—17]) that the nature of this case "seems to be appropriate for this Court's attention." The Special Master finds the appropriateness in five considerations: (1) "the huge sums involved"; (2) "the number of States affected, thirty in all"; (3)

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[6]The tax refund suit was instituted by the seventeen pipeline companies on June 22, 1979, four days subsequent to this Court's order of June 18, 1979, allowing the eight plaintiff States to file their complaint in this original proceeding.

"[t]he issues are important on their own account and because of their effect on the price of gas"; (4) "[a]n expeditious settlement of the controversy is desirable"; and (5) "this Court [if it continues to entertain this original proceeding] can at least control the case and, if it desires, move it forward more speedily than would be possible in a [lower court] trial and appeal procedure."

The State of Louisiana submits that the Special Master has misconceived both the philosophy and the values involved in the invocation and exercise of this Court's original jurisdiction. He has turned the focus of original jurisdiction concepts upside down, concentrating on the supposed appropriateness rather than the inappropriateness of using this Court as a tribunal of original or first impression.

It thus becomes appropriate to restate the nature of this Court's vested jurisdiction over interstate disputes, as well as the factors relevant to any determination to exercise or not exercise that jurisdiction. Central to any such restatement is obedience to the Court's recognition in *Ohio v. Wyandotte Chemicals Corp.*, *supra*, 499, of "the diminished societal concern in our function as a court of original jurisdiction and the enhanced importance of our role as the final federal appellate court."

B. The rationale of original jurisdiction

Any examination of the modern use made of the original jurisdiction vested in this Court must start on a historical note. One must be aware of the prolonged movement away from John Marshall's dictum in *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821), that the Court "must decide" every case properly before it, and that the Court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." This broad proposition is no longer universally true, if indeed it ever was. If for no other reason, the modern need to control and limit the decisional input of cases compels resistance to the efforts of the legal community to exploit to the hilt every facet of jurisdiction vested in this Court.

The original jurisdiction vested in the Court by Article III of the Constitution is clearly governed by the proposition that the exercise of a vested jurisdiction is obligatory only in appropriate cases, despite certain language in the Constitution and Title 28 of the United States Code. Admittedly, the first clause of Section 2 of Article III does extend the judicial power of the United States "to Controversies between two or more States." The second clause defines the original jurisdiction of this Court in terms of the various categories of judicial power, described in the first clause, that *inter alia* involve cases "in which a State shall be Party."[7] And Section 1251 (a) (1) of Title 28 in turn purports to render both original and exclusive this Court's jurisdiction of "[a]11 controversies between two or more States." But, as this Court said in *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972), "We construe 28 U.S.C. §1251 (a) (1), as we do Art. III, §2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases."

Thus, however original or exclusive may be this Court's jurisdiction over controversies between two or more States, there is no constitutional or statutory mandate that such jurisdiction be exercised whenever a State invokes it. Original jurisdiction, in other words, is not to be equated with obligatory jurisdiction. This Court has repeatedly made statements that original jurisdiction is to be "invoked sparingly," *Utah v. United States*, 394 U.S. 89, 95 (1969), and that this type of jurisdiction is marked by "a sparing use" that limits its exercise to "appropriate cases." *Illinois v. City of Milwaukee, supra*, 94.

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[7]But it is well established that "Clause 2 of §2 of Article III merely distributes the jurisdiction conferred by clause one." *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939), and cases cited. As Chief Justice Marshall said in *Cohens v. Virginia*, 6 Wheat. 264, 398-99 (1821), the reference in the second clause of Section 2 to the original jurisdiction of this Court encompassing cases where a State is a party "refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the federal Courts; not to those cases in which an original suit might not be instituted in a Federal Court."

That suits brought in this Court between two or more States are to be adjudicated only in "appropriate cases" is illustrated by *Massachusetts v. Missouri*, 308 U.S. 1 (1939), and *Arizona v. New Mexico*, 425 U.S. 794 (1976). In both instances, the Court declined to exercise its vested original jurisdiction over the cases, because it was found not appropriate to do so. The exercise of jurisdiction was inappropriate in the *Massachusetts* case because the plaintiff, Massachusetts, appeared to have a proper and adequate remedy in the state and federal courts in Missouri. 308 U.S. at 19-20. And the inappropriateness in the *Arizona* case was grounded in the availability of an appropriate state court forum in New Mexico for litigating the identical constitutional issues raised by Arizona in this Court. 425 U.S. at 797.

The *Massachusetts* and *Arizona* rulings are something more than illustrations of what is or is not appropriate. Their reliance on the availability of some other appropriate forum in which the issues at stake can be litigated demonstrates that such availability forms the crux of this Court's growing reluctance to entertain original suits between States other than in the most compelling circumstances. True, there are other ingredients in the appropriateness concept. These include "the seriousness and dignity of the [plaintiff State's] claim," *Illinois v. City of Milwaukee*, *supra*, 93; "the nature of the interest of the complaining State — the essential quality of the right asserted," *Massachusetts v. Missouri*, *supra*, 18; and "the nature of the relief requested ... [and] [t]he nature of the remedy which may be necessary, if a case for relief is made out," *Washington v. General Motors Corp.*, 406 U.S. 109, 114 (1972). But always the core inquiry is whether there is a factual showing of necessity for exercising original jurisdiction and for thus assuming a burden "which might seriously interfere with the discharge by this Court of its duty in deciding the [appellate] cases and controversies appropriately brought before it." *Massachusetts v. Missouri*, *supra*, 19.

In sum, as was said in *Washington v. General Motors Corp.*, *supra*, 113, "The breadth of the constitutional grant of this Court's original jurisdiction dictates that we be able to exercise

discretion over the cases we hear under this jurisdictional head, lest our ability to administer our appellate docket be impaired." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 499, teaches that protection of the administration of the appellate docket sometimes requires a discretionary declination of the exercise of original jurisdiction where "(1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) the reasons of practical wisdom that persuade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's functions attuned to its other responsibilities." The second of these declination rationales necessarily gains importance as time marches on and the appellate docket increases.

These articulated rationales for use of the great original powers of this Court are not reflected in the Special Master's Report. Nowhere does the Report assess whether declination of original jurisdiction in this instance would disserve any of the principal policies underlying the Article III grant. Nowhere does the Report assess the impact of entertaining this original proceeding on the Court's effective and expeditious administration of its appellate docket. The Report does not appreciate or address the Court's expressed concern that its appellate docket duties not be impaired by assuming jurisdiction over an original controversy that could just as well be heard in another forum.

In the *Wyandotte* case, 401 U.S. at 497, this Court gave voice to the fear that an easy assumption and exercise of original jurisdiction could quickly make this Court the principal forum for settling controversies involving state laws — including "laws concerning taxes." In the Court's words:

> As our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. Consider, for example, the frequency with which States and nonresidents clash over the application of state laws concerning taxes, motor vehicles, decedent's estates, business torts, government contracts, and so forth. It would, indeed,

be anomalous were this Court to be held out as a potential principal forum for settling such controversies.

The concerns that are addressed in the Report must yield to the constitutional and practical rationales for utilization of this Court's original jurisdiction. If this Court were to entertain every complaint one State might register against another, without regard to the availability of some other forum, this Court's ability to administer its increasingly heavy appellate docket would be substantially impaired. This Court would then become a tribunal devoted primarily to the trial and resolution of interstate disputes, with little or no time left to perform its other constitutional functions as the nation's supreme appellate body.

Thus the problem posed by this case is quite different from that discussed in the Special Master's Report. The problem is not whether this case "seems to be appropriate for this Court's attention." Rather, it is whether declination of original jurisdiction would be consistent with Article III policies or would advance the Court's ability to perform its heavy appellate responsibilities. If so, it becomes inappropriate to use this Court as a forum of first impression for the adjudication of any given constitutional dispute between States. In resolving that basic jurisdictional concept of inappropriateness, the availability of another forum, where all the constitutional issues can be raised and determined, plays an increasingly decisive role.

C. Reasons for declining jurisdiction

The practical problems that often beset the exercise of original jurisdiction and that thereby divert the Court's energies away from its awesome appellate tasks have been fully explicated in the *Wyandotte* opinion, authored by Mr. Justice Harlan. They need not be repeated here except to reemphasize the Court's concern, 401 U.S. at 498, that it is "structured to perform as an appellate tribunal, ill-equipped for the task of factfinding and so forced, in original cases, awkwardly to play the role of factfinder without actually presiding over the introduction of evidence." Yet, as Mr. Justice Harlan recognized (at 499), discretionary

declination is not simply to shield the Court from "noisome, vexatious, or unfamiliar tasks," such as factfinding, but also

> ... as a technique for promoting and furthering the assumptions and value choices that underlie the current role of this Court in the federal system. Protecting this Court per se is at best a secondary consideration. What gives rise to the necessity for recognizing such discretion is preeminently the diminished societal concern in our function as a court of original jurisdiction and the enhanced importance of our role as the final federal appellate court. A broader view of the scope and purposes of our discretion would inadequately take account of the general duty of courts to exercise that jurisdiction they possess.

It is difficult to perceive how declination of the original jurisdiction invoked in the instant case would offend any of the policies underlying the Article III grant of original jurisdiction as to interstate disputes. Long ago this Court recognized that its jurisdiction over controversies between two or more States "is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable." *Louisiana v. Texas*, 176 U.S. 1, 15 (1900). Such necessity would appear absolute only where the interstate dispute, were it not for the availability of this Court's original jurisdiction, would necessitate diplomatic negotiations or a resort to war, assuming the States were true sovereign entities. See *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 450 (1945); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901).

But where, as here, the interstate dispute involves issues that have been raised and can be judicially settled in some other state or federal forum, there can be no "absolute necessity" for exercising the Court's original jurisdiction. In that event, the issues will ultimately become reviewable by this Court in the exercise of its appellate jurisdiction. Thus the Court is free, in its discretion and in terms of Article III policy, to accept or reject adjudication of the issues in the context of an original proceeding. Neither Article III nor Section 1251 (a) (1) compels this Court to be the

potential or actual principal forum for settling controversies between States of a kind that lend themselves to adjudication in alternative and available forums. The Court is not required to view its original jurisdiction as "an alternative to the redress of grievances which could have been sought in the normal appellate process, if the remedy had been timely sought." See *Illinois v. Michigan*, 409 U.S. 36, 37 (1972).

Moreover, there are many "reasons of practical wisdom" (*Wyandotte*, at 499) that demonstrate the inappropriateness of this Court as the initial forum for testing the constitutionality of the Louisiana tax statute in question. To list the more obvious of these reasons:

(1) The tax refund suit filed by the private pipeline taxpayers is pending in a Louisiana state trial court, the Nineteenth Judicial District Court. It is primarily a trial court, with all the traditional facilities and procedures appropriate to the role of a factfinder. And it can actually preside over the introduction of the multiplicity of facts that underlie the constitutional issues here tendered.[8] The Nineteenth Judicial District Court, in short, has precisely the factfinding characteristics that this Court so woefully lacks. See *Wyandotte*, 401 U.S. at 498. To allow the Louisiana court to find and develop the essential constitutional facts is to free this Court from the awkward burden of factfinding and to permit the Court to devote more of its energies to its heavy — and vital — appellate functions.

(2) Allowing the tax refund suit to proceed to final judgment in the Louisiana state courts would allow those courts to give a definitive construction and interpretation of the Louisiana First Use Tax statute, a new law which has yet to receive any judicial

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[8]Some idea of the vast quantity of the constitutional facts to be established in this case can be gleaned from the Proffer of Proof submitted to the Special Master by the State of Louisiana on April 15, 1980. The Proffer specified 154 complex factual matters that Louisiana deems essential to support the constitutionality of the Louisiana First Use Tax statute. The plaintiff States would doubtless want to offer proof as to many additional facts.

analysis in Louisiana. Declination of this Court's original jurisdiction would thus relieve this Court of the difficult if not impossible task of guessing what interpretation the Louisiana courts will place on this statute and then attempting to resolve the constitutional implications of that interpretation. Withholding the exercise of the Court's original jurisdiction in these circumstances is fully justified by the established abstention doctrine that new state enactments "should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality." *Harrison v. NAACP*, 360 U.S. 167, 178 (1959).

(3) Declination is further justified in terms of lifting from this Court and the parties the burdens of pursuing an original proceeding that at best is needlessly duplicative, unsatisfactory, incomplete and time-taking. Given the on-going tax refund proceeding in the Louisiana state courts, why should this Court, using awkward fact-finding tools, expend time and energy to create a highly questionable superstructure for constitutional litigation? Armed with the unique power to render authoritative interpretations of the Louisiana First Use Tax statute, the Louisiana state courts are far better equipped to construct a relevant factual and statutory base for resolving the constitutional issues. Any reading this Court might give the statute would not be binding on the Louisiana courts and could be discredited at any time. Thus any decision by this Court on the constitutional implications of its statutory reading could well constitute "a tentative answer which may be displaced tomorrow by a state adjudication." *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 500 (1941).

(4) By declining to exercise original jurisdiction in this instance, this Court would also avoid having to address and resolve the many thorny threshold problems, problems rooted deeply in jurisdictional and prudential considerations. These problems, discussed hereinafter, are such as to cast doubts on the "seriousness and dignity," *Illinois v. City of Milwaukee, supra*, 93, of the complaint filed by the eight plaintiff States. But the

point here is that this Court's valuable but limited resources need not be devoted to uprooting these threshold obstacles when there is a smooth alternative route to the constitutional issues. The state tax refund procedure poses none of these obstacles, while providing an authoritative construction of the tax statute and a constitutional ruling that would be subject to this Court's appellate review.

(5) Still another reason for declination deserves emphasis. It is highly questionable whether this Court can or should grant any of the relief requested by the eight plaintiff States. To the extent that the complaint seeks a declaration of the unconstitutionality of the Louisiana First Use Tax statute, which has yet to be authoritatively construed by the Louisiana courts, the plaintiff States are seeking the kind of premature or tentative opinion that this Court should not give. To the extent that the complaint seeks preliminary and permanent injunctions prohibiting Louisiana and its agents from collecting the First Use Tax, serious questions arise as to the impact of the Tax Injunction Act of 1937, 28 U.S.C. §1341, on the exercise and implementation of this Court's original jurisdiction. See *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943).

And the request of the plaintiffs that this Court order

> . . . that any and all revenues collected pursuant to the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce be refunded to the taxpayers with interest thereon

would impose on this Court a function never contemplated by the framers of Article III — the function of acting as the judicial overseer of the state tax refund claims of private taxpayers. Indeed, this particular request is precisely the relief that the taxpayers are seeking in the Louisiana tax refund procedures and that the Louisiana courts are best equipped to provide. Such a duplicative request in this Court also serves to underscore the total absence of any controversy between the plaintiff States and the State of Louisiana; the only true controversy is that between the private pipeline taxpayers and the State of Louisiana. The

plaintiff States are simply acting as volunteers for the private taxpayers in their efforts to secure tax refunds, the States making the refund claims in this Court while the taxpayers pursue the claims in the Louisiana courts.

All these requests for relief suggest reasons why this Court either does not have original jurisdiction in this case or should not exercise it to the extent that it does exist. These requests are classic examples of what this Court meant when it said in *Washington v. General Motors Corp.*, 406 U.S. at 114, that the "nature of the relief requested" and the "nature of the remedy which may be necessary, if a case for relief is made out" can be decisive elements in this Court's discretionary determination whether to exercise its original jurisdiction in a given case.

D. The controlling *Arizona* precedent

All the foregoing reasons for declination in this case serve to bring into focus the precedential nature of this Court's 1976 ruling in *Arizona v. New Mexico*, 425 U.S. 794. While the *Arizona* ruling was by way of denying leave to file a complaint in this Court rather than granting a subsequent motion to dismiss, the case is so factually and conceptually similar to the instant proceeding as to make it a controlling precedent.

In *Arizona*, this Court denied the State of Arizona leave to file a complaint against the State of New Mexico challenging the constitutionality of New Mexico's electrical energy tax. The tax, which was non-discriminatory on its face, was laid upon all generation of electricity in New Mexico, a fact that led to this Court's comment that "the legal incidence of the electrical energy tax is upon the utilities [that generate electricity]." 425 U.S. at 798. As in the instant situation, the utility taxpayers in *Arizona* succeeded in passing on the cost of the tax to their electrical consumers. Such passing on of the tax led the State of Arizona to assert, as do the plaintiff States in this case, that "the economic incidence and burden of the electrical energy tax falls upon it [to the extent the State was a consumer] and its citizens [who were also consumers]." 425 U.S. at 796.

The complaint that the State of Arizona sought to file alleged that the New Mexico tax should be declared unconstitutional since it "constitutes an unconstitutional discrimination against and burden upon interstate commerce, denies Arizona citizens due process and equal protection of the laws in violation of the Fourteenth Amendment to the Constitution, and abridges the privileges and immunities guaranteed them by Art. IV, §2 of the Constitution." 425 U.S. at 795.[9] And the State of Arizona sought to invoke the original jurisdiction of the Court in three capacities:

> (1) As a proprietary consumer of electricity in its state facilities, being forced to bear the burden of the New Mexico tax that had been passed on to all consumers;[10]
>
> (2) As a proprietary generator of electricity in New Mexico, in the form of an Arizona political subdivision known as the Salt River Project,[11] and thus directly subject to the New Mexico electrical energy tax; and
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> (3) As *parens patriae* for all citizens of Arizona who consumed and paid for electricity generated in New Mexico and thus were forced to bear the passed-on burden of the New Mexico tax.

Such was the nature of Arizona's attempt to use the original jurisdiction of this Court to secure a declaration of the invalidity

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[9]There, as here, the complaint also sought to enjoin New Mexico from assessing, levying or collecting the tax. 425 U.S. at 795.

[10]Nothing in the New Mexico electrical energy tax statute compelled electricity consumers to bear the economic burden of the tax. It was identical to the Louisiana First Use Tax statute in that respect. All that the pleadings in the *Arizona* case show is an assertion in the attached state court complaint (paragraph 20) that such a tax is "uniformly . . . passed on to consumers of electricity" in Arizona.

[11]The full name of this state agency was the Salt River Project Agricultural Improvement and Power District. It operated a federal reclamation project pursuant to contracts with the Secretary of the Interior. In conjunction with two investor-owned public service corporations based in Arizona, the Salt River Project owned electrical generating facilities in New Mexico and transmitted such energy to consumers in Arizona. See Paragraph VI of Arizona's proposed complaint in this Court, No. 70, Original, referred to at 425 U.S. at 794.

of a tax statute of a sister State. This Court, in recognition of its philosophy of allowing its original jurisdiction to be invoked but sparingly, denied leave to file the complaint on the discretionary ground that a

> . . . pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated. 425 U.S. at 797 [Emphasis in original].

Italicizing the word "*issues*" is significant. The Court thereby emphasized that, for purposes of declining to exercise its original jurisdiction, it is enough that there be an alternative forum that provides an opportunity to raise and resolve all the "*issues* tendered here." The appropriateness of the alternative forum, in other words, depends not on whether the identical parties can appear in that forum but whether the identical issues can be or are being raised in that forum.[12]

It is instructive to note that the alternative forum found to be appropriate in the *Arizona* case was a New Mexico state court wherein the taxpayers had filed a declaratory judgment action. Those taxpayers, upon whom "the legal incidence of the electrical energy tax" fell (425 U.S. at 988), sought a declaration that the New Mexico tax was unconstitutional for all the reasons suggested and tendered by the State of Arizona in the complaint it sought to file in this Court. It was also a fact, although the Court did not emphasize it, that one of the five plaintiff taxpayers in the New Mexico action was the Salt River Project, a political subdivision of Arizona engaged in the generation of electricity in New Mexico.[13]

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[12]In a sense this stress on the identity of the issues rather than the identity of the parties represents a subtle shift in emphasis from the statement in *Illinois v. City of Milwaukee*, 406 U.S. at 93, that the alternative forum is appropriate for declination purposes if the forum is one "where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had."

[13]Two other plaintiffs were Arizona investor-owned public service corporations, which owned generating facilities in New Mexico jointly with the Salt River Project and distributed electricity within Arizona. The remaining two plaintiffs were Texas and California electric utility corporations, selling and distributing New Mexico energy in their respective states.

Mr. Justice Stevens stated that he concurred in the Court's denial of Arizona's motion for leave to file because "the Salt River Project is able to litigate in another forum." 425 U.S. at 798. In his view, it was unnecessary to open the door of this Court's original jurisdiction to the extent that Arizona was attempting "to litigate [here] on behalf of an entity which has access to another forum." 425 U.S. at 798-99. What is not clear is whether Mr. Justice Stevens meant to imply that, absent a state entity with access to another forum, a State is free to invoke original jurisdiction to litigate the same issues at stake in that other forum at the instance of other unrelated but aggrieved parties.

But the studied reliance by Mr. Justice Stevens on Arizona's privity with the Salt River Project, a matter which was mentioned but not employed to justify the Court's *per curiam* declination, underscores anew that the Court meant what it said. Declination is justified wherever there is an alternative and appropriate forum "in which the *issues* tendered here may be litigated." That means that appropriateness of the forum depends on the identity of the issues, not upon the presence or absence in that forum of a political subdivision of a State that tendered the same issues in this Court. For aught that appears in the *Arizona per curiam*, the Court would have denied leave to file even had the Salt River Project not been a taxpayer party plaintiff in the pending state court action.

The significant core of the *Arizona per curiam* is its use of "issues" as the ultimate test of the appropriateness and suitability of the alternative forum. If the issues tendered in this Court can be raised and resolved in the other forum, from which appellate review by this Court would be available, then what purpose is served by invoking this Court's original jurisdiction? When there is such an appropriate alternative, why force this Court to expend its energies and its awkward factfinding facilities to initiate and oversee the development of constitutional adjudication? The Court has indicated in *Arizona* that there are no good answers to those queries.

The applicability to this case of the *Arizona v. New Mexico* precedent should now be obvious. The same five constitutional issues tendered here by the plaintiff States have been raised and are in the process of litigation in the courts of Louisiana. The ultimate and forthcoming determination by the Louisiana Supreme Court with respect to the meaning and constitutional implications of the First Use Tax statute will be subject to this Court's appellate review powers.[14] And it can safely be assumed that declination in this instance would no more disserve the principal policies underlying Article III or negate the inappropriateness of this Court as a principal trial forum than it did in *Arizona v. New Mexico*. If anything, the "reasons of practical wisdom" justifying declination are stronger and more numerous here than in the *Arizona* litigation.

The Special Master's Report contains no effective denial of the controlling nature of the *Arizona* ruling. The Report states (p. 19 [A—17]), without elaboration, that the "really significant difference" is that "by reason of its relationship to one of the litigants [the Salt River Project], Arizona could be heard in its own behalf in the State court," whereas the plaintiff States in this proceeding "cannot represent themselves in the State court proceedings." For the reasons heretofore expressed, this purported difference is without merit. The *Arizona* declination rested on the fact that the identical "*issues* tendered here" could be and had been raised in the New Mexico proceedings, not on the fact that Arizona was in privity with one of the protesting taxpayers. Indeed, the lack of any privity between any of the plaintiff States in this proceeding and any of the protesting taxpayers in the tax refund proceeding cannot do service as a reason for invoking original jurisdiction. If anything, the lack of privity underscores the States' lack of any real interest in whether Louisiana can constitutionally impose a tax on those who engage in

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[14]In the *Arizona* litigation, the declaratory judgment action in the New Mexico courts resulted in a judgment of the New Mexico Supreme Court that was reviewed and reversed on appeal to this Court. *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979).

one of the specified uses of natural gas in Louisiana. If those States have no standing or grievance to warrant protesting the tax in the Louisiana proceedings, as the Special Master indicates, what greater standing or grievance do they have before this Court?

To the extent that eligibility to participate in the alternative state court proceedings may be a *sine qua non* of declination, even that eligibility is apparent. Nothing in Louisiana law or procedure precludes another sovereign State from intervening or otherwise participating in a Louisiana tax refund proceeding, assuming that State can assert or allege an interest. See LA. C.C.P. art. 1091. Combined with the fact that the plaintiff States are seeking to present precisely the same constitutional issues as the taxpayer plaintiffs in the Louisiana proceedings, the plaintiffs cannot complain for want of an opportunity to be heard in the Louisiana courts.

The Special Master's Report (p. 19 [A—17]) also suggests a possible difference in the fact that the *Arizona* declination came on a motion for leave to file, whereas the Court has already granted the motion in this proceeding. The Report opines that to dismiss the instant complaint at this juncture on the *Arizona* rationale "would be a far more serious reversal, penalizing the plaintiffs both in time and money."[15] The short answer to that suggestion is that this Court's order of June 18, 1979, granting leave to file the complaint without comment, in no way con-

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[15]But see the Special Master's own comment in footnote 9 of the Report (p. 10):

> The grounds urged by the defendant for dismissal are substantially the same as the grounds on which the defendant opposed the plaintiffs' motion for leave to file their complaint. The plaintiffs therefore urge that the granting of their motion over the objection of the defendant amount to a rejection of the defendant's jurisdictional and prudential arguments. However, the Court's order did not explicate the reasons for the order and the defendant urges that it should be taken as postponing consideration of its objections, rather than rejecting them. It does not seem profitable to speculate on the reasons underlying a *per curiam* order. Since the issues are constitutional, the defendant is probably not foreclosed from renewing its argument in the form of a motion to dismiss whatever the basis for the order.

stituted a ruling on any of the jurisdictional and prudential considerations that plague this case. See *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974), and cases cited. Nor can that formal order be viewed as a ruling that the prudential considerations that justify entertaining an original suit have all been met. Certainly the "seriousness" of a declination, or the "time and money" incurred by the plaintiffs, cannot be allowed to control this Court's determination of whether the necessity is so absolute as to justify the exercise of this "delicate and grave" jurisdiction. See *Louisiana v. Texas*, 176 U.S. 1, 15 (1900).

Certain other efforts to distinguish *Arizona v. New Mexico* deserve summary consideration. The plaintiff States, as well as the United States, have previously and consistently urged that the national significance and impact of the Louisiana tax are so much greater than ascribable to the New Mexico tax as to render the *Arizona v. New Mexico* ruling inapplicable. Suffice it to say that the sparing exercise of this Court's original jurisdiction does not depend upon a comparative analysis of the importance of the issues that plaintiff States seek to tender. Only if there is no other available forum in which to raise the tendered issues, whatever their societal impact, does the practical and absolute necessity exist for exercise of the Court's original powers. If that necessity does not exist, the tendered issues must proceed through the established judicial system, culminating in the exercise of the Court's appellate review powers.

The United States has also claimed that *Arizona* is distinguishable on the ground that collection of the New Mexico tax had been enjoined pending the state court proceeding, whereas collection of the Louisiana tax continues (though put in escrow) while the taxpayers pursue their tax refund procedure in Louisiana. In a sense, this contention is but a variation on the theme that the economic impact on gas consumers is so great and immediate that the Court should throw its original jurisdiction cautions to the winds and ignore its Article III commitments to the appellate docket. To the extent that this argument is meant to cast doubt on the efficacy and speed of the Louisiana tax refund procedure, this Court has already rejected the contention.

As hereinafter explicated, the Court has found this particular Louisiana tax refund procedure to be "an adequate remedy to the taxpayer," one in which "he may assert his federal rights and secure a review of them by this Court." *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 301 (1943).

The conclusion follows that the Louisiana tax refund procedure is an adequate and appropriate alternative to the exercise of this Court's original jurisdiction. That is the meaning of the *Arizona v. New Mexico* precedent. It is the meaning of all the precedents in this Court that have warned that original jurisdiction is to be exercised in a most sparing manner, and only in cases of absolute necessity where no adequate alternative forum is available.

II.

PLAINTIFF STATES SHOW NO COMPELLING REASON TO INVOKE ORIGINAL JURISDICTION TO ENJOIN OR SECURE REFUNDS OF LOUISIANA TAXES LEVIED ON CITIZENS OF OTHER STATES

There is a second compelling reason for declining to exercise original jurisdiction in the circumstances of this case. It is a reason expressed in the observation of Mr. Chief Justice Hughes, writing for the Court in *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939):

> To open this Court to actions for States to recover taxes claimed to be payable by citizens of other States, in the absence of facts showing the necessity for such intervention, would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it.

To render that precept totally applicable to the instant case, one may fairly change the opening phrase of the Chief Justice to read: "To open this Court to actions by States to enjoin the col-

lection, or to secure the refund, of taxes payable to another State by citizens of still other States ....:" Whether a State seeks the original offices of this Court to recover its own taxes or to enjoin and secure refunds of some other State's taxes, the same consequential question is posed. Absent a showing of absolute necessity, why should this Court intervene as a *nisi prius* tribunal into the tax affairs of a sovereign State and thereby divert its energies away from the burden of "deciding the cases and controversies appropriately brought before it"?

As developed in Part I of this brief, *Arizona v. New Mexico*, 425 U.S. 794 (1976), demonstrates one reason why the requisite showing of necessity is here absent—the pendency of an adequate alternative forum in Louisiana where all the issues tendered in this Court have been raised. But there are other equally cogent reasons why the plaintiff States have failed to meet the burden of showing a necessity for invoking the original jurisdiction of this Court. Some but not all those failures have been addressed or discussed in Sections A and B of the Special Master's Report dealing with the Motion to Dismiss.

Preliminarily, it should be noted that the plaintiffs' burden of demonstrating reasons why original jurisdiction should be exercised is an extremely high one. This being an action between States, "the burden on the complainant state of sustaining the allegations of its complaint is much greater than that imposed upon a complainant in an ordinary suit between private parties." *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923). Or, as stated in *New York v. New Jersey*, 256 U.S. 296, 309 (1921), "[b]efore this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude, and it must be established by clear and convincing evidence." See also *Colorado v. Kansas*, 320 U.S. 383, 394 (1944).

These expressions of the high burden of proof imposed upon complainant States in an interstate controversy are particularly relevant where, as here, the proof of necessity for invoking the

extraordinary original powers of this Court must come in large part from the pleadings and mouths of the plaintiff States. For example, to the extent that the plaintiff States are seeking to invoke the jurisdiction of this Court to enjoin the collection of the Louisiana First Use Tax, they bear the burden of proving some reason why this Court must enjoin despite the admonition in *Matthews v. Rodgers*, 284 U.S. 521, 526-27 (1932), that, where a suit is brought in any federal court to enjoin the collection of a state tax,

> [t]he scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved, ...

It is with such admonitions in mind that one must assess the various jurisdictional and prudential factors that underlie any demonstration of necessity for invoking the original jurisdiction of this Court. That is indeed a tall order where such jurisdiction is invoked to secure (1) an injunction against the collection of a sovereign State's tax, (2) a refund of that tax to the private taxpayers, and (3) a declaration of the unconstitutionality of that tax—all at the instance of eight other sovereign States that at best have a remote consumer-type interest in the state tax in question. Superimposed upon the plaintiff's burden, of course, is the Court's increasing reluctance to accept any kind of an original case where there is an adequate alternative forum. *Ohio v. Wyandotte Chemicals Corp., supra; Arizona v. New Mexico, supra.*

A. Absence of a sovereign controversy

It is axiomatic that to engage this Court's original jurisdiction over controversies "between two or more States," a plaintiff State must first demonstrate that (1) the injury for which it seeks redress is an injury to its sovereign or quasi-sovereign interests, and (2) the injury to such interests was directly caused by the actions of another state. *Pennsylvania v. New Jersey*, 426 U.S. 660, 663, 665 (1976). Or, to quote again from *Massachusetts v. Missouri*, 308 U.S. at 15, "To constitute such a [justiciable] controversy, it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress ..."

In the case at bar, the eight complaining States have failed to allege, let alone prove by clear and convincing evidence, that Louisiana's imposition of its First Use Tax on private taxpayers in Louisiana has in any way implicated the plaintiffs' sovereign or quasi-sovereign interests. The only alleged interest, the only interest the Special Master could find (Report, pp. 12, 14 [A—11, A—12-13]), concerns the burden on the complaining States' treasuries in having to incur added costs as consumers of natural gas. But the interest of a State as a consumer or purchaser of needed supplies or products does not reflect any sovereign interest. Indeed, while such a consumer interest might indicate some proprietary activity by a State, the very fact that the plaintiff States seek simultaneously to represent *parens patriae* all their gas-consuming citizens demonstrates that the States' interests are not at all sovereign in nature. Their interests are purely those of consumers of gas, indistinguishable from those of the private citizen consumers.

Having failed to prove that any sovereign interests of the plaintiff States are at stake, the plaintiffs could not even begin to prove that the State of Louisiana directly caused any injury to the plaintiffs' sovereign interests. No allegation to that effect is even attempted in the complaint. While the Special Master's Report (p. 14 [A—13]) suggests that "the States do have a quasi-

sovereign interest in their [the citizens'] economic welfare," there is no allegation or proof that Louisiana directly caused any cognizable injury to the "economic welfare" of eight northern States.

In sum, the plaintiffs have failed to allege or prove that any kind of sovereign or quasi-sovereign interest was so directly implicated by the imposition of the Louisiana First Use Tax that only the intervention of this Court, in the extraordinary exercise of original jurisdiction, can save the day.

B. Absence of standing

The plaintiff States have failed to demonstrate that they have such a high degree of standing and interest, either in their proprietary or *parens patriae* capacity, that they should be allowed to continue this original proceeding designed to enjoin and recoup taxes paid to Louisiana by citizens of other States.

At the threshold of the standing problem in this case are two unquestioned considerations:

(1) As the Special Master acknowledged (Report, p. 11 [A—10]), no tax is directly imposed by Louisiana on the plaintiff States. In the Special Master's words, "At no time are they [the plaintiff States] called on to remit funds to Louisiana; they and their citizens pay the pipelines which are liable for the first use tax."[16]

(2) With respect to the direct impact of the Louisiana First Use Tax, and any constitutional implications thereof, the only real parties in interest are the pipeline taxpayers. See *Arizona v. New Mexico*, 425 U.S. at 797-98, where the Court stated, in vir-

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[16]The Special Master erred, however, in suggesting that the plaintiff States and their citizens "pay the pipelines which are liable for the first use tax." There is no such direct privity with the pipeline taxpayers. The activities of the pipeline companies cease when the gas is delivered to local gas distribution companies or local gas service companies, from which customers purchase gas.

tually identical circumstances dealing with a New Mexico tax on electrical energy, that "we are not unmindful that the legal incidence of the electrical energy tax is upon the utilities [the taxpayers]." See also *Gurley v. Rhoden*, 421 U.S. 200 (1975); *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339 (1968).

(1) Proprietary standing

Those two factors undermine the force and effect of the plaintiffs' asserted standing to pursue this original action. As to standing in a proprietary capacity, the States can assert only that they "are major consumers of natural gas subject to the First Use Tax, including gas used for space and water heating in public buildings."[17] And the Special Master sought to find the requisite standing in the circumstance that "although the tax is collected from the pipelines, it is really a burden on consumers," Report at 12 [A—11], adding that the indirectness of the cost of the tax "does not foreclose plaintiffs from asserting the injury to them and their citizens," Report at 14 [A—12].

Such attenuated standing is insufficient to invoke original jurisdiction, particularly where the purpose of the invocation is to enjoin, recoup and invalidate a tax laid by another State on private taxpayers. In such circumstances, the plaintiff States must be able to demonstrate that in substance they are the real parties in interest. They must comply with the principle announced in *Arkansas v. Texas*, 346 U.S. 368, 371 (1953):

> In determining whether the interest being litigated is an appropriate one for the exercise of our original jurisdiction we of course look behind and beyond the legal form in which the claim of the States is pressed. We determine whether in substance the claim is that of the State, whether the State is indeed the real party in interest.

Yet by common consent the plaintiff States are not the real parties in interest in this tax controversy. Not being the tax-

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[17]Plaintiffs' Brief in Support of Motion for Leave to File Complaint at 12.

payers, their interest can rise no higher than that associated with some kind of indirect interest or impact not ascribable to any direct action by the taxing authorities. Such indirectness of interest will not do for the requisite standing to invoke original jurisdiction, as this Court's decision in *Oklahoma v. Atchison, T. & S.F. R.R. Co.*, 220 U.S. 277 (1911), demonstrates. The Court there held that Oklahoma had no standing or interest in its corporate capacity to invoke the Court's original jurisdiction to seek an injunction against a railroad that allegedly charged unreasonable freight rates to shippers doing business in Oklahoma. The Court said (at 286) that, in that capacity, Oklahoma would

> ... have no such interest in a controversy of that kind as would entitle it to vindicate and enforce the rights of a particular shipper or shippers, and, incidentally, of all shippers, by an original suit brought in its own name, in this court, to restrain the company from applying the Kansas rates, as such, to shippers generally in the local business of Oklahoma.

The Court added that Oklahoma had "no direct interest in the particular property or rights immediately affected or to be affected by the alleged violation of such laws." *Id.*

And so in the instant case, the plaintiff States have no direct interest in the particular property or activity subject to the Louisiana First Use Tax. For purposes of standing to invoke the original jurisdiction of this Court to settle a state tax controversy, the indirectness of the plaintiffs' alleged injury requires dismissal of the case. The extraordinary original jurisdiction of this Court to settle disputes between sovereign interests of the States, assuming that it can ever be used to resolve interstate tax controversies, cannot and should not be invoked on anything less than a direct tax assault on some sovereign interest of the complaining State. Without that kind of a direct tax injury, the putative State plaintiff should be considered without standing to invoke original jurisdiction.

In this extraordinary tax setting, it will not do to seek original jurisdiction standing in the traditional concept that standing can

be premised on allegations of "injur[ies] that fairly can be traced to the challenged action of the defendant ...." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 72, 74 (1978). [18]

This Court simply does not don its original robes to assess and remove the indirect economic burdens, suffered by consumer States or their citizens, that are no more than traceable to some other State's tax. To do so would be inconsistent with the narrow Article III philosophy underlying original jurisdiction. It would also open the doors of this Court and perhaps of the entire judicial system to hitherto unknown forms of indirect consumer-type causes of action. Cf. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

Finally, even if this Court should determine that the plaintiff States have standing to sue in their proprietary capacity, Louisiana argues that this Court should recognize that prudential considerations here, as in other kinds of suits by one State against another, justify declination of jurisdiction. As Professors Wright, Miller and Cooper concluded after surveying original jurisdiction actions between States,

> Although most of the ["[s]uits by one state to enjoin enforcement of the laws of another state"] have not seemed susceptible of ready settlement between the states themselves, it is not surprising that the Court has generally rejected efforts to obtain settlement in its orginal [*sic*] jurisdiction .... [J]ustification may be found for the frequent denials of justiciability that seem to leave the same issues open for decision in other tribunals. Other litigation would often avoid unnecessarily direct conflict between the

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[18] Even under the traditional causation principles of standing, the chain of events triggered by Louisiana's First Use Tax exhausted itself upon the payment of the tax by the taxpayers. What triggered the economic burden on the consumers was the decision of the taxpayers not to absorb the tax but to pass it on to the ultimate consumers with the approval and sanction of the Federal Energy Regulatory Commission. Louisiana played no role in the taxpayers' decision not to absorb the burden of the tax.

states involved. Other courts are better equipped to handle any kind of trial, including challenges to state statutes. And there may even be some value in delaying decision, so the states have ample opportunity to exhaust whatever possibilities of satisfactory adjustment there may be, and so that final decision is illuminated by lower court opinions. Special doctrines of justiciability in this setting may indeed be seen as an alternative to more directly discretionary refusals to exercise jurisdiction for similar reasons.

C. Wright, A. Miller & E. Cooper, 17 Federal Practice and Procedure, § 4045 at 135, 136-37 (1978).

(2) *Parens patriae* standing

The plaintiff States have alleged and proved no greater standing to bring this action as *parens patriae* than they have in their proprietary capacity. They have asserted no more of a *parens patriae* interest than that of representing the interests of such of those "citizens of each plaintiff state" who purchase or receive "natural gas supplies ... delivered by interstate natural gas pipeline companies who will be subject to the tax and who will collect such tax from Plaintiff States and their citizens." Paragraph XV of Complaint.

It is immediately obvious that the plaintiffs' *parens patriae* standing suffers the same deficiencies that mark their proprietary standing, to wit:

(1) The gas consuming citizens of these States have no greater or more recognizable legal interest in protesting any tax cost passed on to them in the price of the goods and services that they purchase than do the States in making their purchases.

(2) The alleged economic burden resulting from the passed-on cost of the Louisiana tax is a burden suffered not by all citizens but only by those who purchase and use natural gas. Such a limited burden has never been deemed the kind of general, direct injury to a State's entire economy, or to the health and welfare of all citizens, that will support *parens patriae* standing. Cf.

Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945) (standing to protest antitrust injuries to the entire economy of the State); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (standing to protest effect on entire state economy of cutting off all interstate gas shipments); *New York v. New Jersey*, 256 U.S. 296 (1921) (standing in suit alleging noxious sewage discharge endangered "the health, comfort and prosperity of the State"). Contra: *Oklahoma v. Atchison, T. & S.F. R.R. Co.*, 220 U.S. 277, 289 (1911) (no standing to seek injunction against unreasonable freight rates affecting only shippers).

(3) Standing on a *parens patriae* basis may depend on "the presence or absence of a more appropriate party or parties capable of bringing the suit." *Commonwealth of Pennsylvania v. Kleppe*, 533 F.2d 668, 675 (D.C. Cir. 1976). In the context of an interstate tax controversy, the most appropriate party is of course the taxpayer. The taxpayer is the one who suffers the most direct injury and who is best qualified to protest the tax.

(4) Standing to invoke the original jurisdiction of this Court, whether on a proprietary or *parens patriae* basis, should not rest on an indirect economic burden traceable in some way to the imposition of a tax by some other State.

(5) Where the plaintiff State has no sovereign interest to assert or protect, its effort to represent those citizens who have a tax complaint against another State may reduce the *parens patriae* suit to "nothing more than a collectivity of private [tax] suits" against that State. *Pennsylvania v. New Jersey*, 426 U.S. 660, 666 (1976). Thus in *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387 (1938), this Court declined to accept an original suit to enforce the statutory liability of shareholders of a liquidating state bank, Oklahoma contending it had *parens patriae* standing to sue on behalf of the depositors and creditors. The Court held (at 394) that the *parens patriae* theory

> ... does not go so far as to permit resort to our original jurisdiction in the name of the State but in reality for the benefit of particular individuals, albeit the State asserts economic interest in the claims and declares their enforcement to be a matter of state policy.

The Court's decision in *North Dakota v. Minnesota*, 263 U.S. 365, 375-76 (1923), also echoes this original jurisdiction policy.

In addition to violating the *parens patriae* principles established in these prior cases, the plaintiffs here are asking the Court to make a dramatic and unprecedented expansion in the *parens patriae* concept—an expansion which would lead to vast numbers of additional cases being brought under the Court's original jurisdiction. They contend that a *parens patriae* suit premised on original jurisdiction is proper whenever a State takes an action or imposes a tax that increases the price paid by persons in other States on goods transported from that State. Standing, they thus argue, should be granted here because Louisiana's First Use Tax will increase the price paid for natural gas. Such a contention would allow any State to bring suit in this Court against another State whenever a State increases its severance tax on any sort of natural resources.

Indeed, the principle plaintiffs espouse would allow an original action in this Court if a State makes a pollution control regulation that increases the costs of a company within that State and thus increases the prices of any goods shipped by that company in interstate commerce. Their logic would also allow suit whenever a State increases the state minimum wage, enforces strict health standards, or takes any other action which could increase the costs to a company engaged in interstate commerce, and thus forces the company to pass on that increase to customers residing in other States. Such a startling extension of original jurisdiction is unwarranted, given the clear language in this Court's precedents and the obvious practical effects.

C. Eleventh Amendment considerations

The Special Master properly recognized (Report at 13 [A–12]) that the original jurisdiction of this Court "may not be invoked when the plaintiff State is really asserting a claim in behalf of individuals who are the real parties in interest," citing *Oklahoma v. Atchison, T. & S.F. R.R. Co.*, 220 U.S. 277 (1911); *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976). See also *Louisiana*

v. Texas, 176 U.S. 1 (1900); *New Hampshire v. Louisiana*, 108 U.S. 76 (1883).

But the Special Master does not properly apply this jurisdictional principle to the facts of this case. The problem is one of identifying the individual real parties in interest, if any, on behalf of whom this original action has been brought. The Special Master appears to identify two possible groups of such individuals — the pipeline taxpayers and the gas-consuming citizens — and then purports to excuse both groups from application of the jurisdictional principle by reference to standing concepts. Report at 14 [A—12-13].

The Special Master's confusion is quite understandable. Never before has there been this kind of a volunteer effort by States to represent and prosecute in this Court the claims not of their own citizens but of citizens of States not parties to the litigation. The individuals on behalf of whom this suit has been filed are indeed the real parties in interest — the seventeen private pipeline taxpayers. Not one of those taxpayers is a citizen of any of the plaintiff States, or of Louisiana.[19]

The plaintiff States, in other words, have apparently volunteered to file this original action to prosecute the constitutional claims of foreign pipeline taxpayers relative to the Louisiana First Use Tax. The plaintiff States seek no relief for themselves or their gas-consuming citizens. Instead, they seek precisely what the aggrieved taxpayers seek in their own tax refund proceeding:

(1) A declaration that the Louisiana First Use Tax is unconstitutional and unenforceable with respect to natural gas transported or sold in interstate or foreign commerce;

(2) A permanent injunction prohibiting Louisiana from collecting the tax on such natural gas;

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[19]Sixteen of the pipeline taxpayers are incorporated in Delaware; the seventeenth is a West Virginia corporation. See Paragraph 11 of Complaint of Intervenors, filed in this Court as an attachment to the pipeline taxpayers' Motion for Leave to Intervene as Plaintiffs and to File Complaint at 32-34.

(3) A preliminary injunction, pending final determination, prohibiting Louisiana from collecting the tax; and

(4) An order that any and all revenues collected pursuant to the First Use Tax with respect to such natural gas "be refunded to the taxpayers together with interest thereon."[20]

It is difficult to imagine a more candid concession that this is a spurious original suit, one brought in the names of the eight plaintiff States and their gas-consuming citizens and for the primary benefit and relief of seventeen private citizens of other States. The original jurisdiction of this Court simply cannot be invoked for such private purposes. As was said long ago in *Louisiana v. Texas*, 176 U.S. at 22, "in order that a controversy between States, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one State are injured by the maladministration of the laws of another."

The resulting absence of original jurisdiction over such a spurious claim of a clash between sovereign interests is only exacerbated by the fact that the plaintiff States here seek relief for individuals who are not even their own citizens. But the consequences of this effort to pursue private claims under the umbrella of this Court's original jurisdiction do not end with the absence of jurisdiction. It is equally true that an action brought by one State against another violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to designated individuals — in this instance, the seventeen private pipeline taxpayers. See, e.g., *New Hampshire v. Louisiana*, 108 U.S. 76 (1883); *North Dakota v. Minnesota*, 263 U.S. 365, 376 (1923); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 n.12 (1972).

As this Court said in the *New Hampshire* case, 108 U.S. at 91, "one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of

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[20]Prayer for relief in Complaint of the eight plaintiff States on file in this Court at 27.

the Constitution, by assuming the prosecution of debts owing by the other States to its citizens." To assume jurisdiction over this type of private action against a State is to violate both the letter and the spirit of the Eleventh Amendment.[21]

D. Interference with state tax administration

What is unique and disturbing about this case is the fact that there is no precedent for using the original jurisdiction of this Court as the vehicle for an attempt by one State to interfere with the administration of a tax statute of a sister State. Nor is there any precedent in the annals of original jurisdiction for using this Court as the first and final interpreter of state tax legislation as a prelude to assessing the constitutionality of the state statute.

Among the prayers for relief in the plaintiff State's Complaint are requests for preliminary and permanent injunctions prohibiting Louisiana and its agents and employees from collecting the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce. Such requests immediately raise substantial questions as to the impact of the Tax Injunction Act of 1937, 28 U.S.C. §1341, on the exercise of this Court's original jurisdiction. That Act provides that federal district courts "shall not enjoin ... the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

By its terms, this Act only forbids injunctions by the district courts. This statute, however, reflects a much broader prudential concern that the federal judiciary not use its injunctive or equity powers to interfere with a state's internal economy and its administration of state tax statutes in particular. Five years before passage of the Tax Injunction Act, *Matthews v. Rodgers*, 284 U.S. 521 (1932), affirmed that federal courts could not en-

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[21]In his second interim Report, dated September 15, 1980, the Special Master did not address or mention the Eleventh Amendment implications of this case. But in his first Report, dated May 14, 1980, the Special Master in dealing with the intervention motion of the pipeline taxpayers reserved "final determination of the applicability of the Eleventh Amendment until the final decision of the case."

join collection of a state tax if the taxpayers had a "plain, adequate, and complete" remedy at law in the state courts. Although the Court cited for authority Section 16 of the Judiciary Act of 1789, it stated that the provision "was but declaratory of the rule in equity, established long before [the Judicial Act's] adoption." *Id.* at 525. *Matthews* upheld as a "plain, adequate, and complete remedy" Mississippi's procedure for payment under protest and suit for recovery on the ground that the tax was enacted in violation of the United States Constitution. Similarly, in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), the Court stated that

> This Court has recognized that the federal courts, in the exercise of the sound discretion which has traditionally guided courts of equity in granting or withholding the extraordinary relief which they may afford, will not ordinarily restrain state officers from collecting state taxes where state law affords an adequate remedy to the taxpayer ....
>
> It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states ....
>
> Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation, and necessarily attends injunctions, interlocutory or final, restraining collection of state taxes. These are the considerations of moment which have persuaded federal courts of equity to deny relief to the taxpayer — especially where the state, acting within its constitutional authority, has set up its own adequate procedure for securing to the taxpayer the recovery of an illegally exacted tax. *Id.* at 297-98.

That case involved the same Louisiana refund procedure under attack here. The Court concluded that a federal injunction was improper:

> The considerations which persuaded federal courts of equity not to grant relief against an allegedly unlawful state tax, and which led to the enactment of the Act of August 21, 1937, are persuasive that relief by way of declaratory

> judgment may likewise be withheld in the sound discretion of the court. With due regard for these considerations, it is the court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer the taxpayer may maintain a suit to recover it back. In such a suit he may assert his federal rights and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes.
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> *Id.* at 300-01.

An example of the procedure preferred by the Court can be found in *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64 (1963). In *Halliburton* the plaintiff paid the assessed Louisiana tax under protest and instituted a tax refund suit challenging the validity of the state tax on federal constitutional grounds. The initial construction, interpretation, application and constitutionality of the state tax took place in the state courts. This Court resolved the matter on appeal from the Louisiana Supreme Court. Here, as in *Halliburton*, the taxpayers have paid the tax under protest and instituted their tax refund suits raising the identical constitutional issues presented by the plaintiff States.

The Special Master recognized the principles discussed in *Matthews v. Rodgers* and *Great Lakes Dredge and Dock Co. v. Huffman* in his ruling denying the plaintiff States' motion for judgment on the pleadings. There he stated that "[t]o invalidate a State tax law is a serious limitation on the State's prerogative to manage its own fiscal affairs." Report of the Special Master, September 15, 1980, at 21 [A—18-19].

The constitutional issues raised by the plaintiff States' complaint necessarily depend upon a reading of the Louisiana First Use Tax statute, which the Louisiana courts have yet to interpret. It also depends on a reading of the Louisiana Constitution of 1974, which the pipeline plaintiffs in the Louisiana refund suit argue prohibits this tax. The Louisiana Constitution is new and to a large measure uninterpreted. The state court is the appropriate forum for resolution of state constitutional and statutory issues. Their resolution could obviate the necessity for

examination of the federal constitutional questions. Existence of state constitutional and statutory questions brings into focus the abstention concepts generated by *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). That case counsels abstention whenever a federal court is otherwise forced to interpret state law without the benefit of state court consideration and therefore under circumstances when a constitutional determination is predicated on a reading of the statute that is not binding on the state courts and may be discredited at any time. In the circumstances here, as in *Pullman*, this Court's decision on the constitutional issues raised in the plaintiff States' complaint may well be conjecture, and the underlying litigation rendered meaningless. Preventing such a waste of a district court's time (as in *Pullman*) is important, but preventing such a waste of the Supreme Court's time is vital.

The plaintiff States' broad facial attack on Louisiana's First Use Tax statute poses still another threat to the federal system of government in the form of "needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes." *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 471 (1945). The Court's recent observation in this regard in *Moore v. Sims*, 442 U.S. 415 (1979), clearly applies to the plaintiff States' efforts to use this Court's original jurisdiction to attack a new and complex statute of a sister State:

> State courts are the principal expositors of state law. Almost every constitutional challenge—and particularly one as far ranging as that involved in this case—offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests. When federal courts disrupt that process of mediation while interjecting themselves in such disputes, they prevent the informed evolution of state policy by state tribunals. *Trainor v. Hernandez*, 431 U.S. at 445, 52 L Ed 2d 486, 97 S Ct 1911. The price exacted in terms of comity would only be outweighed if state courts were not competent to adjudicate federal constitutional claims—a postulate we have repeatedly and emphatically rejected. *Id.* at 429-30.

The Court concluded that, with respect to all facets of abstention, "the only pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims." *Id.* at 430. That "adequate opportunity" is demonstrably present in the form of the Louisiana tax refund procedure. This leads us back to *Arizona v. New Mexico*, 425 U.S. at 797, where the Court declined to grant leave to file Arizona's bill of complaint, functionally indistinguishable from the plaintiff States' complaint here, inasmuch as New Mexico, like Louisiana, provided an appropriate state court forum "in which the *issues* tendered here may be litigated."

The plaintiff States ask this Court for a declaratory judgment that the Louisiana First Use Tax statute is unconstitutional and unenforceable on its face. They seek this declaration without awaiting any interpretation or construction of the statute by the Louisiana courts in the pending tax refund suits. Such an effort is totally misplaced. This Court has long frowned on attempts to initiate interpretation of state statutes in federal courts unless an emergency exists. "[A]s questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law." *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1944). Yet the plaintiffs in this case would have this Court guess as to which aspects or interpretations of the First Use Tax statute might create problems under the Commerce Clause, the Supremacy Clause, the Import-Export Clause, the Contract Clause, and the Equal Protection Clause. And the Court is expected to perform this gargantuan task under the rubric of reading the face of the statute.[22]

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[22]The Court's discussion in *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 229, 230 (1957), while directed to an entirely different Louisiana statute, is also relevant to the Louisiana First Use Tax statute:

> The Supreme Court of Louisiana has never considered the specific issue or even discussed generally the rationale of the statute, especially with reference to problems of constitutionality. The District Court recognized
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> *[footnote continued]*

CONCLUSION

Out of the multitude of complaints, motions, briefs, reports and exceptions on file in this proceeding emerges one overall conclusion: As presently structured, this case is not an appropriate subject for the exercise of this Court's original jurisdiction.

Seldom has a single case produced so many jurisdictional and prudential defects. Seldom has it proved so difficult to justify maintaining a case on the original docket. Any prolongation of the pendency of this proceeding before the Court will likely cause even more difficulties to arise, particularly of the prudential variety. Prudential defects tend to beget further problems.

Fortunately, there is one dominant reason for dismissing the complaint, growing out of the fact that there is an available and adequate alternative forum in which all the important constitutional issues here tendered have been raised and are in the process of being resolved. In that circumstance, this Court's decision in *Arizona v. New Mexico* teaches that this complaint should be dismissed forthwith, without prejudice to the right of the interested parties to assert their interests and to participate fully in the on-going tax refund proceedings in the Louisiana state courts.

Dismissal of the complaint on that basis has the added advantage of rendering it unnecessary for the Court to consider and

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the importance of the statute in deciding the case; it also recognized that a problem of interpretation was involved, that the statute cannot be read by him who runs. What are the situations to which the statute is applicable? Is the statute merely declaratory of prior Louisiana law? What are the problems that it was designed to meet? The answers to these questions are, or may be, relevant. Before attempting to answer them and to decide their relation to the issues in the case, we think it advisable to have an interpretation, if possible, of the state statute by the only court that can interpret the statute with finality, the Louisiana Supreme Court. The Louisiana declaratory judgment procedure appears available to secure such an interpretation, ... It need hardly be added that the state courts in such a proceeding can decide definitively only questions of state law that are not subject to overriding federal law.

resolve the more difficult problems involved in some of the other motions now before the Court.

For all of these reasons, the Court should grant the motion of the State of Louisiana to dismiss the complaint. The contrary recommendation of the Special Master should not be followed.

All of the above and foregoing is thus respectfully submitted.

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CERTIFICATE OF SERVICE

I, ROBERT G. PUGH, counsel of record for the State of Louisiana in the above-entitled proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the 14th day of November, 1980, I served copies of the *Exceptions of the State of Louisiana to the Report of the Special Master dated September 15, 1980 and Brief in Support Thereof,* by depositing three copies thereof in a United States mailbox, with postage prepaid, addressed to counsel of record at his or her post office address. Their names and addresses are as follows:

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All parties required to be served have been served.

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APPENDIX

No. 83, Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

STATE OF MARYLAND, *et al.*,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

ON MOTIONS OF THE PLAINTIFFS FOR JUDGMENT ON THE PLEADINGS AND OF THE DEFENDANT FOR DISMISSAL OF THE COMPLAINT

REPORT OF THE SPECIAL MASTER

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Special Master

September 15, 1980

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

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STATE OF MARYLAND, *et al.*,

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ON MOTIONS OF THE PLAINTIFFS FOR JUDGMENT ON THE PLEADINGS AND OF THE DEFENDANT FOR DISMISSAL OF THE COMPLAINT

REPORT OF THE SPECIAL MASTER

This is the second preliminary report to be filed by the Special Master. The first, filed on May 14, 1980, contained the Special Master's recommendations with respect to various motions to intervene and to appear as *amicus curiae*. Those motions are still pending before the Court awaiting action on exceptions to the report. This report will contain the Special Master's recommendations with respect to a motion by the plaintiffs for judgment on

the pleadings filed on September 18, 1979,[1] and a motion by the defendant for dismissal of the complaint, filed on October 22, 1979.[2]

It seems to the Special Master more orderly to deal with the motion to dismiss first, since it is largely concerned with jurisdictional and prudential issues not directly involving the central theme of the complaint and can therefore be considered a preliminary to the issues on the merits raised by the motion for judgment on the pleadings.

FACTS

This case involves the constitutionality of Louisiana's "first use" tax on natural gas. La. Rev. St. 47:1301-1307. Effective April 1, 1979, that law imposes a tax of seven cents per thousand cubic feet of natural gas on the first use within Louisiana of natural gas which is not subject to State severance taxes imposed by Louisiana or by any other State, or to import duties imposed by the United States. In practical effect, all parties agree that the tax is in fact imposed on the first use within Louisiana of natural gas produced from the submerged lands of the outer continental shelf[3] outside Louisiana and from federal enclaves within Loui-

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[1]Those pipelines which filed motions to intervene have also moved for leave to file a motion for judgment on the pleadings. Since the motion to intervene has not been acted on by the Court, this report will not address the pipelines' motion, but will be limited to the motion of the plaintiffs. However, it may be noted that the positions of the plaintiffs and of the pipelines are entirely consistent. Also it should be noted that the United States and the Federal Energy Regulatory Commission (F.E.R.C.—both hereafter referred to as the United States) have filed a brief *amici curiae* supporting the motion of the plaintiffs for judgment on the pleadings.

[2]Although this motion has not been specifically referred to the Special Master for a recommendation, the Special Master believes that the direction to him to "submit such reports as he may deem appropriate" is sufficient authority to justify a report on the motion. Order of March 3, 1980.

[3]The outer continental shelf consists of submerged lands seaward of the three-mile coastal belt ceded to Louisiana in 1953 by the Submerged Lands Act (43 U.S.C. 1301-15) as interpreted and applied to Louisiana by the opinion of this Court in *United States v. Louisiana*, 363 U.S. 1 (1960). By the Outer Continental Shelf Lands Act (43 U.S.C. 1331-43) Congress retained for the United States all rights of exploration, development and production from the outer continental shelf. The coastal States are specifically excluded from imposing their tax laws on the outer continental shelf.

siana.[4]

The Louisiana statute states that its purpose is to compensate its citizens "for costs incurred and paid with public funds, which costs enure solely to the benefit of the owners of natural gas produced beyond the boundaries of Louisiana" and to recover for "damages to the state's waterbottoms, barrier reefs, and sensitive shorelands as a direct consequence of activity within the state associated with such natural gas by the owners thereof."[5] La. Rev. St. 47:1301C.

Under the Louisiana law, the tax is imposed on the owner of natural gas at the time it is first subjected to a "use" within the State. La. Rev. St. 47:1303. The term "use" is defined as

> "the sale; the transportation in the state to the point of delivery at the inlet of any processing plant; the transportation in the state of unprocessed gas to the point of delivery at the inlet of any measurement or storage facility; transfer of possession or relinquishment of control at a delivery

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[4]Nothing developed in the case to date indicates how much gas is produced on federal enclaves. A brief filed by the United States on November 20, 1979, indicates that some gas is produced from the Barksdale Air Force Base, but no figures on amount are provided. There may be a legal distinction between the application of the Louisiana law to gas from enclaves as against gas from the outer continental shelf since the latter production is outside the boundaries of Louisiana and therefore crosses that boundary when it is brought into the State without regard to its ultimate destination. For purposes of the application of the Natural Gas Policy Act of 1978, gas produced on the outer continental shelf is deemed "committed or dedicated to interstate commerce." 15 U.S.C. 3301(18)(A)(i). None of the parties have attributed any significance to this variance in the source of the gas.

[5]In its opposition to the plaintiff's motion to file the complaint, Louisiana cites authorities who estimate that Louisiana is expending $40,000,000 a year for governmental services required for outer continental shelf development and is suffering erosion of its shoreline and barrier reefs of about sixteen square miles annually, 40% of which can be attributed to activities for the development and production of natural gas. The value of the lost land is estimated to amount to $300,000,000 yearly. (Louisiana Brief in Opposition to the motion for leave to file the complaint, p. 24.) In a proffer of proof filed with the Special Master on April 15, 1980, Louisiana recites in great detail the costs to it of services rendered and damages suffered by reason of the operations on the outer continental shelf, but gives no estimate of the dollar amount involved. Louisiana Proffer of Proof, pp. 61-90.

point in the state; processing for the extraction of liquefiable component products or waste materials; use in manufacturing; treatment; or other ascertainable action at a point within the state." La. Rev. St. 47:1302(8).

In practical effect, this case involves for the most part the application of Louisiana's tax to natural gas produced from the outer continental shelf.[6] In a proffer of proof submitted by Louisiana on April 15, 1980, pursuant to the request of the Special Master, there is a description of the procedures involving this gas. It rises to the surface at a platform in the Gulf of Mexico. There it passes through a separator or dehydrator to remove salt water and some impurities. In most cases ownership of the gas passes at the wellhead to the pipeline company. With respect to about 15% of the gas, the producer retains title to the gas until it is brought to shore and the processing is complete. In either case the gas passes through a gathering system of underwater pipelines which lead to the shore and thereafter to processing plants[7] where liquid and liquefiable hydrocarbons and pollutants are removed by a process of compression and decompression, heating and cooling and being subjected to contact with chemicals and oils. Some 5% in volume of the gas is thus removed at the processing plant. At the completion of the processing the dry gas is delivered to pipelines and more than 98% of this gas moves on out of the state. The products removed in the processing, including butanes, propanes, and ethanes, are transported to chemical plants for use as feedstock and fuel. Ordinarily the ownership of these products remains with, or reverts to, the producer.

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[6]In hearings before the Louisiana Senate Revenue and Fiscal Affairs Committee with respect to the bill which became the first use tax, one of the sponsors of the bill, Wilbert J. Tauzin, II, stated at page 3, "We are talking about natural gas brought into this state from outside our boundaries that is not taxed by some other jurisdiction. At the present time that practically means OCS federal gas. That gas is produced outside our three mile limit in federal waters. It is piped in to processing companies in Louisiana and then the dry gas is shipped out of the state."

[7]Louisiana states that there are 124 processing plants in Louisiana which process 95% of the outer continental shelf gas. A processing plant typically occupies about seventy-five acres of land and represents a present cost value of $40,000,000. La. Proffer of Proof, p. 11.

Throughout the process described above, the natural gas is under pressure, either from the well pressure or from compressors, and is in continuous movement throughout its journey. In *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157, 163 (1954), the Court noted that "the entire movement of the gas, from producing wells through the Phillips gasoline plant and into the Michigan-Wisconsin pipeline to consumers outside Texas, is a steady and continuous flow." And the Fifth Circuit in *Deep South Oil Co. v. Federal Power Commission*, 247 F.2d 882 (1957), *cert. den.*, 355 U.S. 930 (1958), stated at pp. 887-88:

> ". . . petitioner's own brief testified eloquently to the continuous movement of the gas which it sells at the wellhead. Petitioner admits, as, of course it must, 'that there is a continuous flow of gas from the Deep South wells into the gathering system of Texas gas; that the mass of gas of which the Deep South gas becomes a part moves continuously through the gathering system into a processing plant; that the movement through the processing plant is continuous; that there is a continuous movement of natural gas from the outlet of the processing plant to both interstate and intrastate destinations. . . .' "

However, gas which would be subject to the tax is exempted if it is used in Louisiana for "the drilling for or production of oil, natural gas, sulphur, or in the processing of natural gas for liquids extraction within the state . . ." or is 'consumed in the manufacture of fertilizer and anhydrous ammonia within the state." La. Rev. St. 47:1303A. A separate law provides that an owner subject to the first use tax, who is also subject to a severance tax on other production of gas or oil within the state, may credit his payment of the first use tax against his severance tax liability. La. Rev. St. 47:647. Further tax credits may be claimed against any other Louisiana tax to the extent that electric or gas utility companies or direct purchasers from the pipelines have been subjected to increases in their costs attributable to the first use tax. La. Rev. St. 47:11.

The first use statute declares "as against public policy," and makes unenforceable, any contractual provision which would entitle an owner of gas subject to the tax to recover the amount of

the tax from any person other than a purchaser. La. Rev. St. 47:1303C. Thus, the burden of the tax, when it is imposed on a pipeline as the owner, may not be passed back to the producer, but must be borne by the pipeline or passed down the line to those who take the gas from the pipeline. Under the statute the tax is considered a cost of preparation or marketing of the gas. La. Rev. St. 47:1303C. So important did the Louisiana legislature consider these provisions that it added another section providing that if it is finally adjudicated that a contract for such pass-back is enforceable then either all first use taxes previously paid and subject to the contract shall be refunded, or the entire statute shall be null and void. La. Rev. St. 47:1307 Sec. 4.[8]

Estimates of the amount of tax to be collected under the act vary from $225,000,000 (Md. Complaint, ¶XIV) to $275,000,000 (Pipeline Br., p. 15) annually. The amount actually collected during the first year of operation has not been established. Other indications of the importance of this case to the natural gas industry are provided in Louisiana's proffer of proof. It is stated that there are 13,500 wells on the outer continental shelf producing 4.1 trillion mcf per year. The pipelines used to bring the gas ashore comprise 9,650 miles. The natural gas produced constitutes 10% of the natural gas consumed in the United States. La. Proffer, pp. 6-8.

The plaintiffs in this action are Maryland, New York, Massachusetts, Rhode Island, Illinois, Indiana, Michigan and

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[8]The Federal Energy Regulatory Commission has authorized the pipelines to pass on to their customers the first use tax collected from them, subject to refund when and if the tax is adjudged to be illegal. *State of Louisiana First Use Tax in Pipeline Rate Cases*, Docket No. RM78-23, Order No. 10, 43 Fed. Reg. 45553 (1978); Order No. 10-A, 43 Fed. Reg. 60438 (1978); and Order No. 10-B, 44 Fed. Reg. 13460 (1979), petitions for review pending *sub nom. Tennessee Gas Pipeline Co., et al. v. Federal Energy Regulatory Commission*, No. 78-3816 (5th Cir.). On April 24, 1980, the Commission issued an additional order modifying in some respects the terms of the prior orders with respect to insuring refunds to consumers. Order No. 10-C. On the same date, the Commission issued a show cause order in the same docket case to resolve the question of whether persons other than natural gas consumers should bear the burden of the first use tax while the constitutionality of the law is litigated. Show Case Order in Docket No. RM78-23 (Phase II) issued April 24, 1980.

Wisconsin. The sole defendant is Louisiana. The plaintiffs filed their motion for leave to file the complaint on March 29, 1979. The complaint alleged unconstitutionality under the commerce clause, the supremacy clause, the duty on imports clause, impairment of the obligation of contracts and the equal protection clause of the Fourteenth Amendment. Only the interstate commerce and the supremacy arguments are involved in the present motions. The plaintiff States allege injury by reason of the additional cost of gas used by them and by reason of such additional costs incurred by their citizens. The amounts alleged are very large: Maryland, $4,000,000; New York, $29,000,000; Massachusetts, $8,000,000; Rhode Island, $370,000; Illinois, $33,000,000; Indiana, $9,000,000; Michigan, $30,000,000; Wisconsin, $10,000,000.

On May 29, 1979, the defendant, Louisiana, filed a brief in opposition to the motion for leave to file. The United States, seventeen pipelines, the American Gas Association, the State of Alabama, and Associated Gas Distributors all filed briefs supporting the plaintiffs. On June 18, 1979, the Court granted the motion for leave to file the complaint and gave the defendant sixty days to answer. On August 17, 1979, Louisiana filed its answer generally denying the assertions of the complaint and asserting the validity of the tax. Thereafter, on September 18, 1979, the plaintiffs filed a motion for judgment on the pleadings. On October 22, 1979, Louisiana filed a motion to dismiss the complaint. The pipelines and the United States filed briefs *amici curiae* supporting the plaintiffs.

On March 3, 1980, the Court appointed the undersigned Special Master and referred the motion for judgment on the pleadings to him. The Special Master has held two open hearings on March 21, 1980, and June 19, 1980, at which the parties and the applicants for intervention participated, to consider the course of proceedings and to hear argument on the various motions. Also, the Special Master requested Louisiana, which had moved for an evidentiary hearing, to submit a proffer of proof covering the factual matters as to which it asserted evidence was necessary. Louisiana has filed an extensive proffer of proof to

which the other participants have responded by memoranda asserting that no evidentiary hearing is necessary.

And so the matter stands.

I.

MOTION TO DISMISS THE COMPLAINT

The defendant presents three arguments for dismissal of the complaint: First, the States have no standing to attack the constitutionality of the tax since the tax is imposed on the owners at the time of the first use of the gas and the fact that those owners have passed the tax on in the form of higher prices does not give the States standing to sue either for their own increased costs or for the increased costs to their citizens; second, the case is not a proper one to invoke the original jurisdiction of the Court since it is really not a dispute between the plaintiffs and Louisiana but between the pipelines or gas consumers and Louisiana; and, third, the dispute can better be tried in some other court, preferably a Louisiana court where State questions of construction can be decided and where constitutional issues, if they survive, can be tried on a full record and then appealed, if necessary, to the Supreme Court. The motion to dismiss does not argue that the constitutionality of the Louisiana law can be upheld on the face of the pleadings.[9]

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[9]The grounds urged by the defendant for dismissal are substantially the same as the grounds on which the defendant opposed the plaintiffs' motion for leave to file their complaint. The plaintiffs therefore argue that the granting of their motion over the objections of the defendant amount to a rejection of the defendant's jurisdictional and prudential arguments. However, the Court's order did not explicate the reasons for the order and the defendant argues that it should be taken as postponing consideration of its objections, rather than rejecting them. It does not seem profitable to speculate on the reasons underlying a *per curiam* order. Since the issues are constitutional, the defendant is probably not foreclosed from renewing its argument in the form of a motion to dismiss whatever the basis for the order.

A. Standing of Plaintiffs To Challenge Tax

Louisiana is, of course, correct in its assertion that no tax is directly imposed by it on the plaintiff States. At no time are they called on to remit funds to Louisiana; they and their citizens pay the pipelines which are liable for the first use tax. At least theoretically the seven cents per thousand cubic feet of gas could be absorbed by the producers of the gas or the pipelines. However, by the terms of the Louisiana statute, the owners liable for the tax are not allowed to pass it back to the producers. La. Rev. St. 87:1303C [*sic*]. The pipelines are public utilities whose rates, and the prices paid by purchasers from them, are controlled by FERC. Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. 717c and 717d. Thus they are entitled to recover from their customers all of the legitimate costs of obtaining the gas, processing it, and transporting it.[10] The Louisiana statute specifically provides that "this tax shall be deemed a cost associated with uses made by the owner in preparation of [or] marketing of the natural gas. La. Rev. St. 87:1303C [*sic*]. Although the FERC had previously accepted contracts which required producers to assume the costs of transporting liquid hydrocarbons associated with natural gas and of processing the natural gas to recover liquid and liquefiable hydrocarbons, FERC has now ordered that the amount of the Louisiana first use tax be handed on to customers, thus accepting for the time being Louisiana's treatment of the item as a cost of processing the gas for transportation.[11] Thus, both by reason of the Loui-

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[10] *See FPC v. United Gas Pipe Line Co.*, 386 U.S. 237, 243 (1967):
"One of [the Commission's] statutory duties is to determine just and reasonable rates which will be sufficient to permit the company to recover its costs of service and a reasonable return on its investment. Cost of service is therefore a major focus of inquiry. Normally included as a cost of service is a proper allowance for taxes, including federal income taxes. The determination of this allowance, as a general proposition, is obviously within the jurisdiction of the Commission."

[11] *State of Louisiana First Use Tax in Pipeline Rate Cases*, Docket No. RM78-23. In issuing its order in this case the FERC challenged the constitutionality of the tax and required the pipelines to institute refund proceedings in the Louisiana courts and to make appropriate undertakings to insure refunds to their customers if the tax is thrown out.

siana law and the orders of FERC, the ultimate cost of the tax is now borne by the plaintiffs and by consumers in the plaintiff States. Under these circumstances it is clear that, although the tax is collected from the pipelines, it is really a burden on consumers. The parties required to stand the cost of the tax should be accorded standing to contest its constitutionality.

In analagous [*sic*] situations this Court has held that a state has standing to sue when it and its citizens have been adversely affected by the actions of a sister state. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). In that case where West Virginia was attempting to restrict the flow of natural gas, this Court said at page 592:

> This interference gives rise to a matter of grave concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest, but one which is immediate and recognized by law.

In *Georgia v. Pennsylvania Railroad*, 324 U.S. 439, 447 (1945), an alleged conspiracy with respect to freight charges imposed on shippers was found to implicate the state sufficiently to sustain its standing to sue. In a more recent case this Court held that, although ordinarily only direct purchasers may recover Clayton Act treble damages, cost-plus purchasers may be in a different posture. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). In these cases the Court looks beyond forms to the substance of the claim. *Arkansas v. Texas*, 346 U.S. 368, 371 (1953).

It would be unfortunate if the parties who actually stand the loss were required to rely on an intermediary who had passed on the loss to them to press the claim of unconstitutionality. In this case the pipelines are in agreement with the plaintiffs, but their interest is different and the states would be allowed to speak for themselves. I conclude they have standing to sue.

B. Jurisdiction as an Original Action

The original jurisdiction of this Court, established by Article

III, Sec. 2, Clauses 1 and 2 of the Constitution, and made exclusive by 28 U.S.C. 1251 (a)(1), may not be invoked when the plaintiff State is really asserting a claim in behalf of individuals who are the real parties in interest. *Oklahoma v. A.T. & Santa Fe Ry.*, 220 U.S. 277 (1911); *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976).[12]

The defendant argues that in this case the plaintiffs are not the real parties in interest, but are volunteers for the pipelines, or for their own citizens. I have discussed the issue of standing with respect to the pipelines above and concluded that the fact that the cost of the tax is indirect rather than direct does not foreclose plaintiffs from asserting the injury to them and their citizens. With respect to the impact of the tax on consumers, the plaintiffs allege damage both in their proprietary status as users of natural gas in their various governmental functions and as *parens patriae*.

The plaintiff States allege that they have incurred material added costs as consumers of natural gas forced to pay higher prices by reason of the first use tax. The annual cost to each of the plaintiffs as alleged in the complaint is as follows: Maryland, $60,000 (¶XVI); New York $300,000 (¶XXVI); Massachusetts, $25,000 (¶XXII); Rhode Island, $25,000 (¶XXVIII); Illinois, $270,000 (¶XVIII); Indiana, $70,000 (¶XX); Michigan, $650,000 (¶XXIV); Wisconsin, $70,000 (¶XXX). As far as these sums are involved, the States are not suing *parens patriae* or in

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[12]In the latter case the Court said at 665-66:

"It has however, become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens.

* * *

"This rule is a salutary one. For if, by the simple expedient of bringing an action in the name of a State, the Court's original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievancies [*sic*], our docket would be inundated. And, more important, the critical distinction, articulated in Art. III, Sec. 2, of the Constitution, between suits brought by 'Citizens' and those brought by 'States' would evaporate."

any other representative capacity; they are suing to protect their own treasuries.

With respect to the injury done to the States by reason of the imposition of the additional costs on their citizens, the States do have a quasi-sovereign interest in their economic welfare. The individuals affected are not a selected group but practically the entire population. Perhaps some large consumers and the public utilities have individual claims of sufficient size to justify suits; but by and large it would seem difficult if not impossible for individual consumers to establish sufficient damage to themselves and a class suit would seem to be unmanageable. *Cf. Hawaii v. Standard Oil Co. of California*, 405 U.S. 251 (1972). The case seems to fall within the general class of cases in which the states have been recognized as proper parties. *See Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (restriction on shipment of oil); *Missouri v. Illinois*, 180 U.S. 208 (1901) (sewage in river); *Kansas v. Colorado*, 206 U.S. 46 (1907) (diversion of water); *New York v. New Jersey*, 256 U.S. 296 (1921) (pollution of harbor); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (altering flow of stream).

The Special Master concludes that the case falls within the original jurisdiction of the Court.

C. Court's Discretionary Authority To Restrict Use of Original Actions

Assuming that the plaintiffs have standing to sue and that the case falls within the original jurisdiction of the Court, the question still remains whether the Court should exercise its discretion over the use of original actions by dismissing the action.

It is clear, of course, that controversies between the States fall within the original jurisdiction of the Court under Article III, Section 2, Clauses 1 and 2 of the Constitution, which jurisdiction is exclusive by reason of 28 U.S.C. 1251 (a)(1). The exclusivity of the jurisdiction suggests that in ordinary course the Court should accept such cases since the very grant of power to the Court to

the exclusion of other federal courts carries the implication that the Court will exercise its authority. But it is also clear that the Court can, and will, refuse to accept jurisdiction of a cause when there are other and better ways of resolving the dispute. *Arizona v. New Mexico*, 425 U.S. 794 (1976); *Massachusetts v. Missouri*, 308 U.S. 1, 18-19 (1939). In *Louisiana v. Texas*, 176 U.S. 1 (1900), the Court said at 15:

> But it is apparent that the jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter itself properly justiciable.

In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), the Court stated at pp. 93-94:

> It has long been this Court's philosophy that our original jurisdiction should be invoked sparingly. * * * We construe 28 U.S. 1251 (a)(1) as we do Art. III, Sec. 2, Cl. 2 to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer.

The alternatives to the original suit here do not seem attractive as the means of deciding this controversy between the States. The defendant urges that the best forum to hear the case is the judicial system of Louisiana where the courts would have authority to construe the Louisiana statute and perhaps decide it on State grounds which would avoid the necessity of a constitutional adjudication.

There are at present two lines of cases in the State courts. First, the Governor and other officials of the State brought an action on September 22, 1978, against the pipelines and other owners subject to the tax. The case was filed in the Nineteenth Judicial District Court of Louisiana. The title of the case is *Edwards v. Transcontinental Gas Pipe Line Corp.*, Docket No.

216,867. The plaintiffs asked for a declaratory judgment on the constitutionality and construction of the first use statute. The defendants have filed answers raising the same arguments the plaintiffs present in this case. The case is presently in the discovery stage. The plaintiff States in this case are not parties to that proceeding, nor is the United States or FERC.

Second, the pipeline companies which have sought to intervene in this proceeding have filed a tax refund suit on June 22, 1979, in the Nineteenth Judicial District Court. *Southern Natural Gas Co. v. McNamara*, Docket No. 225,533. The defendants are the Secretary of the Department of Revenue and Taxation, the Department itself, and the State of Louisiana. The plaintiffs raise the same issues as are involved in the other State case and here. Again the plaintiff States here are not parties, nor is the United States or FERC. This case also is in the discovery stage.

Finally, the Federal Energy Regulatory Commission filed an action in the United States District Court for the Middle District of Louisiana on September 29, 1978, against the State officials. *Federal Energy Regulatory Commission v. McNamara*, C.A. 78-394. The plaintiffs sought to enjoin enforcement of the first use tax on the same grounds as are asserted in the other cases. On motion of the defendants the action was stayed on January 26, 1979. An Appeal from the stay was filed in the Court of Appeals for the Fifth Circuit, but that appeal is presently stayed.

None of these cases appears to be a suitable substitute for the original action. In the State cases, the plaintiff States have no standing and the court apparently has no authority to grant injunctive relief pending the outcome of the cases. The refunds, if ordered, appear to be limited as to interest to 6% which would result in a substantial advantage to the State and damage to the plaintiffs in view of the quarter of a billion dollars which is being collected annually. But, in any event, the plaintiffs should not be required to depend on private parties to conduct their litigation and protect their interests; they should be permitted to speak for themselves.

As for the United States District Court case, it is clear that the Constitution and Judicial Code give exclusive jurisdiction over the States' case against Louisiana to the Supreme Court so that the States cannot intervene. In view of the amounts involved, moreover, it would seem questionable to leave it to the United States to litigate, to invite the delays incident to a trial, to appeal to the Court of Appeals and then to an application for review here and eventually to consideration on the merits here. Of course cases can be expedited, but if the matter is to be tried in an evidentiary hearing of the type asserted to be necessary by the defendant, it will take time; if the evidentiary hearing is not required, it equally well can be decided here.

The strongest precedent in favor of dismissing the complaint and allowing the issues to be litigated in some other forum is *Arizona v. New Mexico*, 425 U.S. 794 (1976). That case involved an attempt by Arizona to institute an original action in this Court. Arizona was suing in its proprietary capacity as a consumer of electricity and as *parens patriae*. New Mexico had levied a tax on electric generation which fell on three companies that sold electricity in Arizona. Although the taxing statute appeared nondiscriminatory on its face, it was alleged that certain tax credits with respect to electricity sold in New Mexico resulted in the tax actually applying only to electricity sold outside of the State. By the time the motion for leave to file came before the Court, suit had already been brought in the New Mexico courts by the three interstate electric companies attacking the constitutionality of the tax. One of the plaintiffs in that suit was related to Arizona so that the state could in effect represent itself in the New Mexico suit. This Court denied Arizona leave to file, holding in a *per curiam* decision that it was more appropriate to rely on the New Mexico proceeding.[13]

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[13]After the litigation in the State courts, on appeal this Court held the tax invalid. *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979). The Court held the tax invalid under the Supremacy Clause as inconsistent with a federal statute, 15 U.S.C. 391, prohibiting a state from imposing a tax on the generation or transmission of electricity that imposes a greater tax burden on electricity consumed outside of the taxing State than in it.

Both the plaintiffs (Brief in Support of Motion for Leave to File Complaint, pp. 14-18) and the United States (Brief *Amicus* on Motion for Leave to File Complaint, pp. 10-14) have drawn distinctions between that case and this. All the distinctions have merit, but the really significant difference is that, by reason of its relationship to one of the litigants, Arizona could be heard in its own behalf in the State court. The plaintiffs here cannot represent themselves in the State court proceedings described above. Also, in the Arizona case the issue was decided on the motion for leave to file. This Court has granted that motion in this case, permitting the filing, and to dismiss it now on grounds raised on consideration of the motion would be a far more serious reversal, penalizing the plaintiffs both in time and money.

The nature of this case seems to be appropriate for this Court's attention. It is important both because of the huge sums involved and because of the number of States affected, thirty in all. The issues are important on their own account and because of their effect on the price of gas. The defendant asserts the case is not appropriate for original consideration by the Court because, it asserts, an extensive evidentiary hearing is necessary. Even if such a hearing proves to be necessary, the Court has adopted procedures for trying such cases.[14] An expeditious settlement of the controversy is desirable since the refund proceedings cannot make the plaintiffs whole and, while no great speed seems possible in a case of this magnitude and complexity, this Court can at least control the case and, if it desires, move it forward more speedily than would be possible in a trial and appeal procedure.

The Special Master recommends that the motion to dismiss the complaint be denied.

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[14]*See, e.g., Arizona v. California*, 373 U.S. 546 (1963), a case which took two years to try before a special master. Three hundred and forty witnesses were heard and the transcript consisted of 25,000 pages.

II.

MOTION FOR JUDGMENT ON THE PLEADINGS

The plaintiff States argue that on the basis of the complaint and answer they are entitled to judgment. While there are many facts in dispute, the plaintiffs assert that the Louisiana first use tax should be declared unconstitutional on the basis of facts that are not in dispute, on facts as to which the Court may take judicial notice, and on principles of law established by the Court. The tax act must fall, they say, because under the Supremacy Clause it is overruled by the Natural Gas Act, the Natural Gas Policy Act of 1978 and the Outer Continental Shelf Act. In the second place, plaintiffs claim that, apart from its inconsistency with federal statutes, the act must fall because it encroaches on the exclusive interstate commerce field assigned to federal control. As to both claims it is argued that no evidentiary hearing is necessary or appropriate.

It is the Special Master's conclusion that the facts disclosed in the complaint and answer do not, without more, require that the act be invalidated on the basis of the Supremacy Clause. There are provisions of the federal and State laws which may be irreconcilable in operation; the Louisiana first use tax may in fact interfere with the federal regulatory process; but, on the other hand, the interference may be so indirect, so peripheral, so subject to administrative adjustments, as to permit the State and federal programs to coexist. Evidentiary hearings are necessary to reach a conclusion on these issues.

As far as the Interstate Commerce Clause is concerned, the Special Master believes that a determination on the validity of the Louisiana tax could be made on the pleadings, plus a generous application of judicial notice. But the Special Master also suggests that to reach a conclusion on the papers involves such an application of judgment that it would be desirable to withhold a conclusion until the issues can be tested against facts developed in an evidentiary hearing. To invalidate a State tax law is a serious limitation on the State's prerogative to manage

its own fiscal affairs.[15] The Special Master believes that the chance of an erroneous decision can be materially reduced by permitting the parties to present a factual record on the operation of the law rather than judicially noticing abstract scientific theories and engineering practices and then applying legal theories and findings from prior cases to situations not contemplated at the time they were pronounced.

A. Application of the Supremacy Clause

The Natural Gas Act (15 U.S.C. 717-717w) was enacted in 1938 to assure consumers of natural gas of fair prices and to protect them from the monopolistic power of the interstate pipelines in a field where the States were powerless to act. *See Federal Power Comm. v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944); *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 388-89 (1959). The Federal Power Commission (FPC), whose duties have been inherited by the Federal Energy Regulatory Commission (FERC), was given authority to regulate the interstate gas industry from the wellhead to the delivery of the gas to intrastate distributors or consumers. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954). Authority was given the Commission to regulate the prices of sales in interstate commerce for resale, to require certificates of convenience for the connection of pipelines, to approve contracts for the acquisition of gas, and fix the charges for transportation of gas. 15 U.S.C. 717c, 717d, 717f. Every aspect of the interstate natural gas business was entrusted to FPC regulation. Sec. 1(b) of the Act (15 U.S.C. 717(b)) provides:

> (b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial,

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[15] *See Great Lakes Dredge and Dock Company v. Huffman*, 334 U.S. 385 (1949); *Matthews v. Rodgers*, 384 U.S. 521 (1932). The Congress has recognized this policy in 28 U.S.C. 1341, limiting the district courts' authority to issue injunctions in such cases.

> or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

The courts have interpreted the Act through the years in line with its purpose to grant the FPC, and now the FERC, full authority to implement the Act by rules, regulations or orders as domestic and international conditions have developed.

The Natural Gas Policy Act of 1978 (15 U.S.C. 3301) amended the Natural Gas Act in an attempt to undo the economic effect of fixing prices for interstate natural gas while leaving intrastate gas unregulated. This had resulted in a severe shortage of gas in the interstate market while producers sought to profit from the higher prices in the intrastate market. The 1978 act was an attempt to put all natural gas on an equal basis and thus to alleviate the shortage. In order to protect consumers of gas from the inclusion in the processing and transportation costs of expenses more properly allocable to the production and transportation of liquid and liquefiable hydrocarbons, FERC was given specific authority to allocate such costs between the products involved. 15 U.S.C. 3320.

The second federal statute involved is the Outer Continental Shelf Lands Act which was enacted in 1953. (43 U.S.C. 1331). This Act provides that the development of the resources of the submerged lands seaward of the boundaries of the coastal states be given to the federal government with authority over the exploration, leasing, and production of natural resources including oil and gas. The act specifically excludes the States from control over that area. 43 U.S.C. 1333.

The history of the dispute with Louisiana over its interest in the submerged lands goes back to 1950 when this Court determined that the U.S. had paramount rights in the submerged lands up to the shoreline. *United States v. Louisiana*, 339 U.S. 707. Congress, heedful of the States' claim that they had lost

revenue from areas on which they had previously relied, ceded to the coastal States the submerged lands and their resources within their historic boundaries. *Submerged Lands Act*, 43 U.S.C. 1301 (1953). The validity of this cession was upheld in *Alabama v. Texas*, 347 U.S. 950 (1954), and the Louisiana boundary under the act was fixed at three miles in *United States v. Louisiana*, 361 U.S. 1 (1960).

Having given to the coastal States the submerged lands within their boundaries, the Congress then proceeded to make provision for the development of the remainder of the continental shelf seaward of the belt given to the States. In the committee hearings leading up to this statute, Louisiana and the other gulf States presented strong pleas that they be granted a share of the income from the parts of the shelf abutting their boundaries to compensate them for the expenses they foresaw devolving on them as a result of the offshore operations. Hearings before the Senate Committee on Interior and Insular Affairs on S. 1901, 83d Cong., 1st Sess. pp. 185-6, 187-8, 191-3, 265-6. In the end the Congress decided to give no share of the income from the outer continental shelf to the States and specifically wrote into the law a prohibition against any application of the States' tax laws to the area. S. Rep. No. 411, 83d Cong., 1st Sess., pp. 2-3, 13-14. 43 U.S.C. 1333 (a)(2)(A) provides: ". . . State taxation laws shall not apply to the Outer Continental Shelf." And in 1933 (a)(3): "The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in, or jurisdiction on behalf of, any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom." Section 9 of the Act (43 U.S.C. 1338) provides that all revenues go into the federal treasury.[16]

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[16]In a sense, the first use tax can be considered the most recent step in Louisiana's continuing effort to press its claim to profit from the production of oil and gas off its coast. The claim was first asserted in the initial dispute with the United States over title to all of the submerged lands, a dispute which was re-

[footnote continued]

The final federal statute involved is the Coastal Zone Management Act. 16 U.S.C. 1451. One of the provisions of this statute provides for a fund to make grants to the States to compensate them for the impact of the federal programs for energy development. 16 U.S.C. 1456a. This is one of the purposes declared by the Louisiana legislature in the first use tax as a justification for imposing the tax.

Considering first the possible conflict with the Natural Gas Act, it is clear that Congress did not totally exclude the States from regulating some phases of the industry. This Court in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), recognized that, before the passage of the Natural Gas Act, the States had been held powerless under the Commerce Clause to protect themselves against abuses in the industry. *See, e.g., Missouri v. Kansas Gas Co.*, 265 U.S. 298 (1924). The Court in *Hope* noted at pp. 609-10 that the House report on the bill stated that its purpose was to fill the gap. In accomplishing that purpose the bill was designed to take "no authority from State Commissions" and was "so drawn as to complement and in no manner usurp State regulatory authority." H. Rep. 709, 75th Cong., 1st Sess p. 2. By the terms of the statute the federal government is given authority over interstate transportation, sales for resale in interstate commerce, and over gas companies engaged in such transportation or sale;

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solved in favor of the United States in *United States v. Louisiana*, 339 U.S. 707 (1950). The attempt in Congress to recover by legislation what had been lost in litigation was partially successful in that the Submerged Lands Act gave Louisiana the three mile belt along its coast. As pointed out in the text, Louisiana failed to convince Congress that it should share in the proceeds from the outer continental shelf. Louisiana continued to litigate as to the extent of its historic boundaries, which was finally fixed at three miles in *United States v. Louisiana*, 361 U.S. 1 (1960). Since that decision there has been extensive further litigation to fix the line and determine the disposition of royalties theretofore collected. *See, e.g., United States v. Louisiana*, 420 U.S. 529 (1975). The entire history of this litigation is described in an opinion of the Court issued last term. *United States v. Louisiana*, 100 S. Ct. 1618 (1980). The imposition of the first use tax, which is at precisely the same rate as the severance tax, is looked upon by the plaintiffs as one more step by Louisiana to recover some of the revenues it lost when it lost the submerged lands case.

while the States retain power to regulate local distribution and "the production or gathering of natural gas." 15 U.S.C. 717. Nothing is specified about State taxation, but the Natural Gas Policy Act of 1978 seems to recognize that the States may impose severance taxes on local production. 15 U.S.C. 3320 (a)(1).

The plaintiffs highlight two aspects of federal regulation under the Natural Gas Act and the Natural Gas Policy Act which they assert override the provisions of the first use tax.

First, they assert that the federal authority to fix prices, the very "heart" of the Natural Gas Act (*Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 611 (1944)), is undercut by the Louisiana law, since the tax is added to the cost of the gas which is to be sold in interstate commerce. Plaintiffs rely on such authority as *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84 (1963); and *Oklahoma Corporation Commission v. Federal Power Commission*, 415 U.S. 961 (1974). They may be right since the impact of the tax appears to be directed at interstate sales by reason of the exemptions and credits granted intrastate users. But a decision is hard to make on the pleadings since it is difficult to calculate how great an effect on the regulatory power of the FERC is imposed. We do know that the FERC has permitted, over its strong disinclination to do so, the first use tax to be treated as a cost of transportation and of processing and therefore included as one of the underlying factors on which the price to consumers is fixed. *State of Louisiana First Use Tax Rate Cases*, Docket No. R.M. 78-23 Orders No. 10, 10-A and 10-B, n.8, *supra*. The issue eventually to be resolved is whether the first use tax is just one of the many factors affecting the price, some of which are beyond FERC control, or whether it is a substantial hindrance to the Commission's powers.

Second, the plaintiffs press a more difficult problem resulting from the provisions of the Louisiana law which allot the tax to the cost of preparation [or] marketing of natural gas and outlaw contractual provisions passing the tax back to producers while permitting it to be added to the purchase price of consumers. La. Rev. St. 47:1303C. Basically this does not appear to be a fiscal

matter since the revenue to the State is the same whoever eventually pays the bill. Louisiana in its Answer to the Complaint justifies the provision by stating that "the sole purpose, intent, and application of the [provision] has been to ensure that the First Use Tax will not unreasonably burden any person within the interstate commerce stream but will be passed along to the ultimate users and consumers. Because the tax will be borne by the ultimate users and consumers, neither party to the contracts in question suffers." La. Answer, ¶LX, p. 21. But FERC had previously accepted contracts that provided that the processing involved and the tax on it were properly considered costs of producing liquid and liquefiable hydrocarbons, not properly to be borne by consumers of the natural gas.

For the present, FERC has adopted regulations permitting the tax to be passed along, but making provision for refunds to the consumers if the tax is finally held invalid and mandating the pipelines to seek relief in the Louisiana courts. *State of Louisiana First Use Tax Rate Cases*, Docket No. R.M. 78-23. And FERC is itself seeking to upset the tax in the federal courts. *Federal Energy Regulatory Commission v. McNamara*, C.A. 78-394 M.D. La. Meanwhile the FERC administrative proceedings are continuing with an order to show cause why the producers should not be billed for and pay the First Use Tax with respect to liquid or liquefiable hydrocarbons transported with or extracted from natural gas. FERC Order to Show Cause in R.M. 78-23.

Thus FERC's final decision as to the allotment of the tax is still not made.

There is an ongoing dispute between the parties as to the legal effect of the processing by which the hydrocarbons are extracted and its effect on the natural gas. In part this turns on the physical nature of the process. If the natural gas is essentially the same when it goes into, and comes out of, the processing plant, and if the hydrocarbons are products which were retained by the producers from the start and are separated for their profit, then the position of the FERC is sound that the cost, including the

tax, should revert to the producers rather than being passed on to the customers. But if the processing is essentially a step to make the gas dry and of the Btu content standardized for transportation and use, then it is reasonable to pass the tax on to consumers. Plaintiffs claim that the authority to make that judgment is granted to FERC (*Federal Power Commission v. United Gas Pipe Line Co.*, 386 U.S. 237, 243-246 (1967)), and that Louisiana interferes with its function when it seeks to allot the tax. The Special Master believes that the conflict with the Natural Gas Act is the type of issue which cannot suitably be resolved on the papers or by reference to past decisions which were not really focused on the issue. Moreover, it may be that in the end FERC's orders can be adjusted so that the laws will mesh without conflict.

The alleged conflict between Louisiana's law and the Outer Continental Shelf Lands Act does not appear to require an evidentiary hearing. The argument appears to be that Louisiana is in effect imposing a tax on the production of gas produced in the federal domain, in spite of a specific prohibition against that action. 43 U.S.C. 1333 (a)(2)(A). This is a legal question which can be answered by an analysis of the two statutes. It is true that the principle [*sic*] objects of the first use tax are actions with respect to, or transactions in, natural gas produced on the outer continental shelf. But no tax is imposed on any action or person until the gas has been brought into the state. To be sure, all, or almost all, of the gas produced does come into the State, and all, or almost all, of the gas that is brought into the State is subjected to one of the "uses" which results in liability for the tax. But that does not of itself answer the question since what happens in the State may subject it to authority of the State. *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

The case which most strongly supports Louisiana's position is *Portland Pipeline Corp. v. Environmental Improvement Commission*, 307 A.2d 1 (Maine), *appeal dismissed*, 414 U.S. 1035 (1973). There, in order to provide funds to clean up oil spills, a tax was levied on the movement of oil over Maine's harbor waters. All, or almost all, of the oil taxed was, or had been, the

subject of interstate or foreign commerce. Nevertheless, the court held that the tax was not on the oil itself but on the act of transporting it over Maine's waters. This case dealt not with a tax on gas but on oil, so that there was no question of the supremacy of the Natural Gas Act though a question could have been raised about the supremacy of the Water Quality Improvement Act of 1970. 33 U.S.C. 1321. What the case stands for is the continuing right in the States to protect their interests so long as their regulations do not hamper interstate commerce.

The most substantial possible conflicts appear to be between the Louisiana tax law and the Natural Gas Act, particularly the provisions with respect to passing the burden of the tax back to the producers or forward to the consumers. This may prove to be an irreconcilable conflict but, as this Court said in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 at 157 (1978):

> The Court's prior cases indicate that when a State's exercise of its police power is challenged under the Supremacy Clause, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act. *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218-23 (1947).

The decision whether to decide the issue on the pleadings, or to hold evidentiary hearings, is complicated by the fact that if hearings are held and the case prolonged, Louisiana stands to gain materially by continuing to collect a quarter of a billion dollars a year which, under its provisions for the refund of taxes paid under protest, would be repaid with only 6% interest, whereas the current value of this enormous fund would be far greater than 6%. It is desirable, therefore, to reduce the delay in deciding this case or to eliminate the profit to Louisiana from the delay.[17]

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[17]An interim injunction against the collection of the tax while its validity is being determined would eliminate this element of rewarding Louisiana for extending the litigation, but injunctions against the collection of State taxes are not favored.

It does not appear to the Special Master that the desirability of expediting a decision outweighs the desirability of deciding the issues on the basis of a complete record. The Special Master recommends that the Court not grant the motion for judgment on the pleadings on the basis of the Supremacy Clause.

B. Interference with Interstate Commerce

We are concerned here with gas which is produced from the outer continental shelf, brought ashore by pipelines, processed in plants which remove pollutants and liquid and liquefiable hydrocarbons, delivered to interstate pipelines and transported out of the State. The whole movement is "steady and continuous flow." *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157, 163 (1954). And in *Deep South Oil Co. v. Federal Power Commission*, 247 F.2d 61 (5th Cir. 1957), it was recognized that "the mass of gas of which the Deep South gas became a part moves continuously through the gathering system into a processing plant; that the movement of natural gas from the outlet of the processing plant to both interstate and the intrastate destinations." The courts have held that the natural gas is in interstate commerce during the entire journey. *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 369 (1965); *Interstate Natural Gas Co., Inc. v. Federal Power Comm.*, 331 U.S. 682, 684-7 (1947); *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464, 467 (1950).

The defendant asserts that the interstate transportation of natural gas commences at the tailgate of the processing plant and that the processing is a local activity that transforms "wet" gas into a different product, "dry" gas, so that the processing and the steps which precede it do not directly involve the the interstate transportation. In view of the continuous movement of the gas, this seems a doubtful interpretation, but it hardly helps Louisiana in any event since the movement from the outer continental shelf across the state boundary and up to the processing plant would itself seem to be an interstate journey. *See Continental Oil Co. v. Federal Power Commission*, 370 F.2d 57, 66

(5th Cir. 1966). Moreover, the Natural Gas Policy Act of 1978 defines the term "committed or dedicated to interstate commerce" to include "(i) natural gas which is from the Outer Continental Shelf", 15 U.S.C. 3301(18). Thus, all of the uses preceding the processing would be part of a prior interstate transportation even if Louisiana were correct in asserting that the processing itself broke the chain. Moreover, even if the tax is considered to be imposed on a separable local event, it still will offend the interstate commerce clause if the result of the tax is to impair or hinder the interstate commerce. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64 (1963).

Although it has been recognized that interstate commerce can be called on to meet its fair share of the State's costs, it has been held that in order to be valid a tax must be (1) "fairly apportioned; (2) "not discriminatory against interstate commerce"; (3) "applied to activity with a substantial nexus with the State"; and (4) "fairly related to service provided by the State." *Department of Revenue of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 750 (1978). The plaintiffs claim that Louisiana's tax does not fall equally on both inter- and intrastate transactions, and that it is not fairly apportioned to an identifiable activity within the state.

Louisiana replies that its tax does not discriminate since a tax of seven cents per thousand cublic feet is imposed on all natural gas within the State, either as a severance tax with regard to gas produced within the State or as a use tax when the gas is produced outside the State and thereafter subjected to the specified uses within the State. But this equality is confused by a series of exclusions and credits. First, there is excluded gas used in drilling for or producing oil, natural gas, sulphur or in processing natural gas for liquids extraction, or in the manufacture of fertilizer and anhydrous ammonia, all within the State. La. Rev. St. 47:1303A. No exclusion is provided if these uses are made of the gas outside of the State. Secondly, a severance tax credit is allowed under which a taxpayer liable for the first use tax may, if

he is also a producer of other gas within Louisiana, credit his first use tax payment dollar for dollar against his liability for severance taxes.[18] Since there is no apparent relation between the ownership of outer continental shelf gas and the production of gas in Louisiana, it is hard to understand Louisiana's motive in permitting this credit, but it obviously aids an intrastate operation in a way not available to a pipeline engaged only in interstate transportation or producing gas outside of Louisiana. Finally, another credit for any increase in fuel costs by reason of the first use tax is allowed for use within the State by electric generating plants, gas distribution services, and direct purchasers from an interstate pipeline. This credit may be taken against any Louisiana tax or combination of taxes, other than severance taxes, owed to Louisiana, subject to a maximum credit of $2,000,000 and a minimum of $250. La. Rev. St. 47:11. Thus, Louisiana customers of local utilities and local consumers buying directly from the pipelines are protected in whole or in part from the incidence of the tax which is passed on to consumers out of the State.

The plaintiffs assert that these exclusions and credits all work to discriminate against the out-of-state consumer in favor of the Louisiana user.[19] Perhaps so, but it is hard to tell from the pleadings what adjustments can be made in the base prices, and what allowances can be made between buyers and sellers which might reduce or eliminate any disadvantage of one over the other. This Court has said:

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[18]The brief for the United States, n. 47, p. 51, illustrates the effect of this credit: "This difference can be illustrated by the following example. Owner A has 1000 mcf of OCS gas; owner B has 500 mcf of OCS gas and 500 mcf of gas subject to Louisiana's severance tax. A owes $70 of first use tax; B owes $35 of first use tax and $35 in severance tax. B, however, pays only $35 in first use taxes. He owes no severance tax because he can credit the first use payment against the severance tax liability."

[19]In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), this Court held unconstitutional a Louisiana use tax which on its face was merely complementary to a sales tax, but in operation discriminated against out-of-state purchases. *See also Nippert v. City of Richmond*, 327 U.S. 416 (1946).

> "in each case it is our duty to determine whether the statute under attack, whatever its name may be, will in practical operation work discrimination against interstate commerce. [*Best & Co. v. Maxwell*, 311 U.S. 454, 455-456.] This concern with the actuality of operation, a dominant theme running through all state taxation cases, extends to every aspect of the tax operations. . . . Considered in isolation, the Louisiana use tax is discriminatory; it was intended to apply primarily to goods acquired out-of-state and used in Louisiana. If it stood alone, it would be invalid. However, a proper analysis must take 'the whole scheme of taxation into account.' " *Halliburton Oil Well Cementing Co. v. Reily*, 337 U.S. 64, 69 (1963).

So here, instead of being discriminatory, the "actuality of operation" may show that the tax is a "compensating" tax intended to complement the State severance tax as the use tax complemented the sales tax in *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

The plaintiffs also assert that the Louisiana tax is invalid because it does not meet the *Washington Stevedoring* case's requirement that the tax must be fairly apportioned. It would seem that that test would be of prime importance when a State is imposing a tax on a business's gross revenues or on its assets as a whole, when, in order to avoid multiple taxation by numerous States, each should tax only the proportion of the entirety which falls within its domain. Here the tax is on the total amount of natural gas within the State and subject to use there. Just as a sales tax, or a severance tax, is imposed on the total amount of the commodity sold or produced, so it would seem appropriate to levy a use tax on the total amount involved. It does not seem to the Special Master that the apportionment requirement has any application here, unless the tax is so large as to put a barrier in the path of interstate commerce. If it does in fact obstruct or hinder interstate commerce it is bad; but that is a factor which would have to be developed in a full hearing. *Cf. Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

Probably the case which on its facts is closest to this one is *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157

(1954). In that case Texas levied what it termed an occupation tax on "gathering" gas, an activity the regulation of which is left to the States by the terms of the Natural Gas Act. 15 U.S.C. 717 (b). In the artificial definition of "gathering" prescribed by the Texas law, it included "taking" gas from the outlets of a scrubbing plant, where the liquid and liquefiable hydrocarbons are separated from the wet gas and dry gas suitable for pipeline transportation is produced. The Court found that after this "taking" there was no separable local activity not an integral part of the flow of interstate commerce. The "taking" the Court held was not a local event separable from the interstate transportation. It was not an activity like producing natural gas, generating electricity, or mining ore, activities upon which a tax may be levied if it is fair and not a burden or hindrance. A real "gathering" tax might be different. Applying the *Michigan-Wisconsin Pipeline* case to Louisiana's uses as defined in the act would result in some of the acts being too intimately connected with interstate transmission to survive. However, the statute has a separability clause. La. Rev. Stat. 47:1307, Sec. 2. Some of the uses may be constitutionally taxable even though others are bad. Probably the best cases can be made for the "uses" defined as "processing for the extraction of liquefiable component products or waste materials" or as "use in manufacturing." La. Rev. Stat. 47:1302(8).

There is a very real dispute among the parties as to the legal effect of the "processing" use. The plaintiffs would have the Court hold that the processing does not interrupt the transportation process and that the gas delivered at the outlet of the processing plant is the same gas received at the entry with impurities and hydrocarbons removed. Louisiana would analogize the processing process as being similar to the manufacture of a new product. They would like to prove that it changes the chemical content of the gas so that what comes out of the plant is different from what goes in.[20]

[20]The parties have not addressed the significance of the "use in manufacturing" use, but since it must take place within the State to be taxable one can assume that the tax credits and exclusions referred to above would minimize any tax on this use.

In passing upon the constitutionality of other use taxes, this Court has said:

> Not the tax in a vacuum of words but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern. *Nippet v. Richmond*, 327 U.S. 416, 431 (1946).

If it were not for the time factor which favors Louisiana and permits it to continue to collect a quarter of a billion dollars a year and to gain an enormous financial advantage from the use of the funds even if required to give a refund in the end, it would be obviously advantageous to permit the parties to support their divergent positions by evidence relevant to the interpretation and administration of the law, the physical features of the entire process, and the economic impacts on and adjustments by buyers and sellers and consumers. However, the plaintiffs have not asked for interim relief. The best way to minimize the time factor is to press the proceedings forward as expeditiously as possible. I cannot conclude that the time factor justifies the Court in granting the motion on the pleadings.

RECOMMENDATIONS

The Special Master recommends that:

1) The motion of the defendant for the dismissal of the complaint be denied.

2) The plaintiffs' motion for judgment on the pleadings be denied without prejudice to a reconsideration of the issues raised on the basis of further proceedings.

Respectfully submitted,

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Special Master

September 15, 1980

No. 83, Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

STATE OF MARYLAND, *et al.*,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

ON THE REPORT OF THE SPECIAL MASTER DATED SEPTEMBER 15, 1980

MOTION OF PIPELINE COMPANIES FOR LEAVE TO FILE EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER, EXCEPTIONS, AND BRIEF IN SUPPORT THEREOF

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November 14, 1980

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 83, Original

STATE OF MARYLAND, *et al.*,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

ON THE REPORT OF THE SPECIAL MASTER
DATED SEPTEMBER 15, 1980

MOTION FOR LEAVE TO FILE EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER AND BRIEF IN SUPPORT THEREOF

The pipeline companies, intervenor-applicants in this proceeding,[1] through their undersigned counsel of

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[1] Columbia Gas Transmission Corporation, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Florida Gas Transmission Company, Michigan Wisconsin Pipe Line Company, Mississippi River Transmission Corporation, Natural Gas Pipeline Company of America, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Sea Robin Pipeline Company, Southern Natural Gas Company, Tennessee Gas Pipeline

[footnote continued]

record, respectfully move the Court for leave to file the attached Exceptions to the Report of the Special Master dated September 15, 1980, with Brief in Support. In support of this motion, the pipeline companies show:

1.

On August 28, 1979, the pipeline companies filed a motion for leave to intervene as plaintiffs, asserting that since they are the taxpayers under the First Use Tax, they have significantly protectable interests at issue in the litigation which are not adequately represented by any other party. Plaintiffs did not oppose the intervention; however, Louisiana filed an opposition on September 24, 1979, to which the pipeline companies responded on October 9, 1979.

2.

On September 18, 1979, plaintiffs filed a motion for judgment on the pleadings, asserting that the uncontested facts in the pleadings establish their entitlement to judgment on two of the several grounds raised in the complaint: (1) the First Use Tax is invalid under the Supremacy Clause of the United States Constitution because it is preempted by the Natural Gas Act, the Natural Gas Policy Act of 1978, the Outer Continental Shelf Lands Act and the Coastal Zone Management Act; and (2) the First Use Tax is invalid under the Commerce Clause of the United States Constitution

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Company (a division of Tenneco Inc.), Texas Eastern Transmission Corporation, Texas Gas Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, and United Gas Pipe Line Company ("the pipeline companies").

because it constitutes a discriminatory and unapportioned tax on interstate commerce.

3.

On November 5, 1979, the pipeline companies filed their own motion for judgment on the pleadings with accompanying brief, together with a motion for leave to file same, which presented a different perspective on the grounds asserted by plaintiffs in their motion for judgment on the pleadings.

4.

On March 3, 1980, the Court appointed a Special Master. By report dated May 14, 1980, the Master found that "[t]he interests of the pipelines in the outcome of this suit is direct and material," and recommended that the motion of the pipeline companies for leave to intervene be granted.

5.

By report dated September 15, 1980, the Master recommended that the plaintiffs' motion for judgment on the pleadings be denied. Although the report is in terms directed solely to the motion submitted by the plaintiffs, it in effect disposes of the pipeline companies' motion for judgment on the pleadings as well.

6.

Since the Court apparently intends to dispose of the Master's recommendations as to intervention and judgment on the pleadings simultaneously, the pipeline companies clearly should be permitted to submit their own exceptions to the Master's report on the motions

for judgment on the pleadings. This will probably be the only opportunity, as a practical matter, for them to present their views to the Court on the questions dealt with in that report. Moreover, consideration of the pipeline companies' arguments will not only promote the interests of justice by allowing the pipeline companies to speak for themselves regarding the resolution of issues which directly and materially affect their interests, but consideration of their different perspective will be of assistance to the Court in passing on the Master's recommendation against disposing of this controversy without an evidentiary hearing.

WHEREFORE, the pipeline companies pray that the attached Exceptions to the Report of the Special Master dated September 15, 1980, with Brief in Support be ordered filed.

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EXCEPTIONS

The pipeline companies except to the Report of the Special Master dated September 15, 1980, in the following respects:

1. The Special Master erred in failing to find that the First Use Tax on its face improperly infringes upon the pervasive regulatory scheme established by the Natural Gas Act and the Natural Gas Policy Act of 1978 in violation of the Supremacy Clause.

2. The Special Master erred in failing to find that the First Use Tax on its face conflicts with the Outer Continental Shelf Lands Act in violation of the Supremacy Clause.

3. The Special Master erred in failing to find that the First Use Tax on its face thwarts the comprehensive federal regulatory scheme established by the Outer Continental Shelf Lands Act and the Coastal Zone Management Act in violation of the Supremacy Clause.

4. The Special Master erred in failing to find that the First Use Tax on its face unlawfully discriminates against interstate commerce in violation of the Commerce Clause.

5. The Special Master erred in failing to find that the First Use Tax on its face exposes the pipeline company taxpayers to the risk of multiple taxation in violation of the Commerce Clause.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 83, Original

STATE OF MARYLAND, *et al.*,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

ON THE REPORT OF THE SPECIAL MASTER
DATED SEPTEMBER 15, 1980

BRIEF IN SUPPORT OF EXCEPTIONS

STATEMENT

The Report of the Special Master dated September 15, 1980 ("Report") recommends that the plaintiffs' motion for judgment on the pleadings be denied.[2] Although the pipeline companies have sought leave to file a motion for judgment on the pleadings on their own behalf, the Master expressly declines to address the

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[2]The Report also recommends that Louisiana's motion to dismiss, filed May 29, 1979, be denied. The pipeline companies do not except to this recommendation.

pipeline companies' motion on the ground that his earlier recommendation that their intervention be granted has not yet been acted upon by the Court. Report at 2, n.1.

Nevertheless, the Report has the effect of disposing of the pipeline companies' motion for judgment on the pleadings. Further, the different perspective advanced by the pipeline companies in support of their motion and in these exceptions serves also to establish that judgment on the pleadings should be granted. For both of these reasons, the pipline companies wish to address the errors made by the Master in reccommending that the plaintiffs' motion for judgment on the pleadings be denied.[3]

SUMMARY OF ARGUMENT

I.

In declining to invalidate the First Use Tax summarily under the Supremacy Clause, the Master recognizes that the "provisions of the federal and state laws . . . may be irreconcilable in operation, . . ." However, he goes on to urge, "the interference may be so indirect, so peripheral, so subject to administrative adjustments as to permit the state and federal programs to coexist." Report at 21.

This conclusion, however, is based on an overly narrow view of the Natural Gas Act, the Natural Gas Policy Act and the Supremacy Clause. As shown below, it ignores the Court's repeated reaffirmation that while

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[3]In order to avoid repetition, the pipeline companies adopt the statement of the case set out in the brief in support of exceptions being filed by the plaintiffs.

Congress excluded the local activities of production and gathering and of retail sales from federal natural gas regulation, it intended to provide a pervasive federal regulatory scheme in which the federal interest was dominant with respect to the areas covered, *i.e.*, the interstate transportation and sale of gas for resale. Also, he ignores the well established Supremacy Clause principle that in such circumstances there is no room for any state action, whether it conflicts, interferes with, curtails, or supplements federal regulation in the preempted areas. *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941).

Since, therefore, the mere existence of a potential interference by state action with the areas thus preempted is sufficient for the invalidation of such state action under the Supremacy Clause, the extent or magnitude of such interference, or the possibility of administrative adjustment thereto, is irrelevant. Accordingly, contrary to the Master's recommendation, no further proceedings, evidentiary or otherwise, are needed in order to rule promptly that the First Use Tax is invalid under the Supremacy Clause.

II.

The Master erred in finding that the First Use Tax does not directly conflict with the provision of the Outer Continental Shelf Lands Act which prohibits state taxation of natural resources of the outer continental shelf.

To properly characterize a tax, examination must be made of the particular statute involved. Since the First Use Tax is in substance, if not in form, a severance tax on federal outer continental shelf gas, it is expressly prohibited by the Outer Continental Shelf Lands Act.

III.

The Master erred in failing to find that the First Use Tax thwarts implementation of the Coastal Zone Management Act and the Outer Continental Shelf Lands Act.

The First Use Tax represents yet another attempt by Louisiana to undermine the exclusive authority of the federal government over federal outer continental shelf energy activities. The Coastal Energy Impact Program, established by the 1976 amendments to the Coastal Zone Management Act and as further amended by the Outer Continental Shelf Lands Act in 1978, serves as the sole means of affording compensation to coastal states for outer continental shelf activities. This program conditions receipt of funds by coastal states upon participation in the Coastal Zone Management Act which requires that states adopt a coastal management program which complies with articulated standards designed to promote prudent use of the coastal zone. The First Use Tax not only conflicts with the intent of Congress that the Coastal Energy Impact Program provide the sole source of outer continental shelf derived financial support for coastal states but it also undermines the intent of Congress to preclude states from amassing funds reflecting outer continental shelf activities which are not directly tied to the Coastal Zone Management Act.

IV.

The Master erred in finding that an evidentiary hearing is "desirable" in order to determine whether the First Use Tax discriminates against interstate commerce. Report at 21. Although he apparently believes that the

taxing scheme formed by the tax and its companion statutes is discriminatory, Report at 34, he refuses to recommend that the tax be declared unconstitutional because he thinks the State of Louisiana may be able to show, at an evidentiary hearing, that adjustments and allowances can be made between buyers and sellers which might eliminate the discriminatory effect of the tax, Report at 35, or that the "actuality of operation" of the tax may show that it is a compensating tax which complements the state's severance tax under the rationale of *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), Report at 35. The Master erred in both respects.

The Court has never required an interstate business to adjust its prices or make allowances to its customers to rectify a competitive imbalance created by a state tax. The First Use Tax discriminates on its face and so *a fortiori* it must discriminate in its operation. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977). No evidentiary hearing is needed for a determination that the taxing scheme in question discriminates because the tax is imposed solely on gas originating outside Louisiana's boundaries; owners of federal outer continental shelf gas who also produce natural resources in Louisiana are relieved of the economic burden of the tax, whereas the pipeline companies are not; and the tax is so designed that its entire economic burden is imposed on consumers in states other than Louisiana.

Moreover, as a matter of law, the First Use Tax cannot be considered a compensating tax with respect to Louisiana's severance tax since the activities taxed by, and the situations of the taxpayers under, the two taxes are radically different. A prerequisite for the

validity of a compensating tax is the existence of similarly situated taxpayers under the two taxing schemes under consideration. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963). This prerequisite is not met by the First Use Tax. Even if the First Use Tax, by itself, could properly be considered as compensating for the severance tax, the taxing scheme formed by the First Use Tax and its companion statutes clearly does not so compensate, because it creates an economic imbalance in favor of Louisiana interests.

V.

The Master erred in finding that an evidentiary hearing is needed to determine whether the First Use Tax exposes the pipeline companies to the risk of multiple taxation. In *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954), the Court considered a Texas tax imposed on "gathering" gas and measured by the entire volume of gas "taken," with the taxable incident being the pipeline company's taking of the gas from the outlet of a processing plant for immediate interstate transmission. The Court set the tax aside for the reason, *inter alia*, that such "taking" would be repeated in other states, so that the tax created the risk of multiple taxation. No evidentiary hearing is needed to determine that the First Use Tax fits squarely within this holding, because the pipeline companies, in the normal course of their operations, necessarily subject the gas to "uses" (as that term is defined in the tax) in states other than Louisiana, and those states would have the power to impose an identical tax on the same volume of gas taxed in Louisiana.

ARGUMENT

I.

NO EVIDENTIARY HEARING IS NECESSARY FOR THE COURT TO HOLD THAT THE FIRST USE TAX IS PREEMPTED BY THE NATURAL GAS ACT AND THE NATURAL GAS POLICY ACT OF 1978.

A. The Special Master Misconceives The Applicable Standards.

The Master has recommended that an evidentiary hearing is necessary to determine whether the First Use Tax is preempted by the Natuaral Gas Act and the Natural Gas Policy Act of 1978. The Master recognizes that the First Use Tax conflicts with the right of the Federal Energy Regulatory Commission ("the Commission") to regulate the interstate transportation and sale of natural gas, but concludes that evidence might be adduced by Louisiana to show that the Commission's regulation could "be adjusted so that the laws will mesh without conflict." Report at 29.

The Master failed to apply the clear holdings of the Court which have recognized that a state statute may be preempted *even absent an actual conflict* where a federal regulatory scheme is "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it," or where an act of Congress touches a field "in which the federal interest is so dominant that the federal interest will be assumed to preclude enforcement of state laws of the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *See also Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941). Under such

circumstances, an actual conflict is not required; rather, it is sufficient that the state law touch upon the area covered by the federal law. Determination of the existence of such a situation is solely a question of law. *Graham v. Richardson*, 403 U.S. 365 (1971).

The pipeline companies contend in their motion for judgment on the pleadings that the First Use Tax invades an area pervasively regulated by the Natural Gas Act and the Natural Gas Policy Act of 1978. *See* Pipeline Companies' Brief in Support of Motion for Judgment on the Pleadings ("Pipeline Companies' Brief") at 22-28. *See also* Plaintiffs' Brief in Support of Motion for Judgment on the Pleadings ("Plaintiffs' Brief") at 14-15; Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae ("Government Brief") at 20-22. The Master apparently accepts this proposition. *See* Report at 27-28. However, he declines to recommend that the First Use Tax is void on this ground without further factual finding of irreconcilable and substantial conflict. In failing so to recommend, the Master patently erred.

In enacting the Natural Gas Act, Congress admittedly did not intend to exclude the states totally from regulating certain limited phases of the natural gas industry, *i.e.*, the local activities of production and gathering at one end of the spectrum, and retail sales to the ultimate consumers at the other. However, the Court has repeatedly recognized that as to those areas of the industry which are subjected to the regulatory jurisdiction of the Commission, Congress intended to "create a comprehensive and effective regulatory scheme" and has "occupied the field" to the exclusion of state regulation. *See, e.g., F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972); *Panhandle*

Eastern Pipe Line Company v. Public Service Comm'n of Indiana, 332 U.S. 507, 519-20 (1947); *Interstate Natural Gas Co. v. F.P.C.*, 331 U.S. 682, 690 (1947); *Public Utilities Comm'n v. United Fuel Gas Co.*, 317 U.S. 456, 467 (1943). The Court has also recognized that there is a dominant federal interest in the areas subjected to the Commission's jurisdiction. *See, e.g., Interstate Natural Gas Co. v. F.P.C.*, 331 U.S. 682, 692 (1947).

Thus, at the same time that the Natural Gas Act left the matters of production and gathering and of retail sales to the states, it excluded from state action those areas—other than direct sales—which otherwise might be subject to local control but which bore on or affected matters subject to Commission regulation under the pervasive federal scheme. *Natural Gas Pipeline Co. of America v. Panoma Corp.*, 349 U.S. 44 (1955); *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84 (1963); *Oklahoma Corp. Comm'n v. F.P.C.*, 415 U.S. 961 (1974), *aff'ing* 362 F.Supp. 522 (W.D. Okla. 1973); *Public Service Comm'n of Kentucky v. F.E.R.C.*, 610 F.2d 439 (6th Cir. 1979).

Such far-reaching preemption protects federal regulation of matters of national concern requiring uniformity of treatment from the danger of being hampered or frustrated by state action furthering local interests. *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621, 632-636 (1972); *Interstate Natural Gas Co. v. F.P.C.*, 331 U.S. 682, 692 (1947). *Cf. DeCanas v. Bica*, 424 U.S. 351, 359, fn.7 (1976); *New York Tel. Co. v. New York Labor Dept.*, 440 U.S. 519, 528-529 (1979) (plurality opinion of Mr. Justice Stevens).

B. No Evidentiary Hearing is Required Since the First Use Tax Facially Encroaches Upon the Exclusive Federal Regulatory Scheme.

Under the above cited precedents, the Natural Gas Act and the Natural Gas Policy Act vest with the Commission the exclusive jurisdiction over the transportation and sale for resale of natural gas in interstate commerce. As shown below, the First Use Tax impermissibly encroaches upon these areas, both by undertaking to require increased rates for the interstate transportation and sale of natural gas and seeking to prescribe how the burden of this tax is to be allocated.

1. The First Use Tax Interferes With The Commission's Administration Of Contracts Subject To Its Jurisdiction.

The First Use Tax directly encroaches upon the Commission's exclusive authority to administer contracts subject to its jurisdiction under the Natural Gas Act. Pipeline Companies' Brief at 28-32. *See also* Plaintiffs' Brief at 23-24; Government Brief at 30-43.[4] The Master found: (1) that the First Use Tax contains "provisions . . . which allot the tax to the cost of preparation (or) marketing of natural gas and outlaw contractual provisions passing the tax back to producers while permitting it to be added to the purchase price of consumers," Report at 27;[5] and (2) that the Commis-

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[4]The First Use Tax would, of course, also encroach upon the Commission's jurisdiction over contracts subject to its jurisdiction under Section 110(a)(2) of the Natural Gas Policy Act of 1978, as shown in the Pipeline Companies' Brief at 32.

[5]That the First Use Tax was intended to be passed onto the ultimate consumer is obvious from the legislative history of the

[footnote continued]

sion has "previously accepted contracts that provided that the processing involved and tax on it were properly considered costs of producing liquid and liquefiable hydrocarbons, not properly to be borne by consumers of natural gas," Report at 28. Despite this recognition of a clear conflict between the terms and provisions of contracts "previously accepted" by the Commission and subject to Commission jurisdiction, and the First Use Tax which "outlaw (such) contractual provisions," the Master declined to conclude that the First Use Tax is invalid under the Supremacy Clause.

Instead, he went on to observe that: (1) "FERC has adopted regulations permitting the tax to be passed along, but making provision for refunds to consumers if the tax is finally held invalid . . ."; (2) "FERC administrative proceedings are continuing with an order to show cause why the producers should not be billed for and pay the First Use Tax with respect to liquid or liquefiable hydrocarbons transported with or extracted from natural gas"; and (3) "[t]here is an ongoing dispute between the parties as to the legal effect of processing . . . natural gas," which in turn depends upon the physical nature of the process. Report at 28. Rather than relying on past decisions by the courts which have considered the function of processing and its legal effect, *see*, pp. 19-21, *infra*, the Special Master recommends that an evidentiary hearing be held thereon,

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statute as well as from its express terms. *See*, Hearings on H.R. 768 Before the Senate Committee on Revenue and Fiscal Affairs of the Louisiana Legislature (1978) at pp. 3-5, 12-13, 25-28 (Rep. Tauzin), 13-16 (Mr. Staton representing Mid Continent Oil and Gas Association), 18-20 (Mr. Garmon representing Exxon Company USA). The Solicitor General furnished copies of the verbatim transcript of these hearings to the Court in November, 1979.

observing that "it may be that in the end FERC's orders can be adjusted so that the laws will mesh without conflict." Report at 29.

But, since, as the Master recognizes, the "outlaw provisions" of the First Use Tax on their face conflict with the allocation provisions of the contracts approved by the Commission in the exercise of its authority under the Natural Gas Act, the Master's further observations are inapposite. Where, as here, the federal scheme of regulation of natural gas in interstate commerce has been shown to be pervasive, the states are precluded from regulating in the same area. Indeed, the only relevant inquiry is whether the state has infringed upon an area of federal law, and not whether, despite such infringement, the federal agency's "orders can be adjusted so that the laws will mesh without conflict." The Master's specific recognition that the First Use Tax infringes upon the Commission's administration of contracts subject to its jurisdiction inevitably calls for the conclusion that the First Use Tax is invalid under the Supremacy Clause and no evidentiary hearing is required.

2. The First Use Tax Infringes on the Commission's Ratemaking Responsibility.

The pipeline companies also contend that the First Use Tax indirectly, if not directly, infringes upon the exclusive domain of federal regulation by undertaking to require increased rates for the interstate transportation and sale of natural gas. Pipeline Companies' Brief at 32-42. *See also* Plaintiffs' Brief at 18-23. The Master conceded that this contention may be correct, but he declines to recommend that the tax be declared invalid on this ground without an evidentiary hearing, stating

that "a decision is hard to make on the pleadings since it is difficult to calculate how great an effect on the regulatory power of the FERC is imposed." Report at 27.[6]

Again, the Master has applied the wrong standard for preemption in this case. The question in situations involving preemption under a pervasive federal regulatory scheme such as the Natural Gas Act is not the *extent* to which a state staute or regulation effects or infringes upon the federal scheme. Rather, the critical question relates to the existence *vel non* of *any* effect or infringement; once such effect or infringment is shown to exist, the offending state action must be set aside. *See, e.g., Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84 (1963); *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972). *See also Backus v. Panhandle Eastern Pipe Line Co.*, 558 F.2d 1373, 1375-76 (10th Cir. 1977), where the court invalidated an Oklahoma statute that required an interstate pipeline to furnish gas to customers occupying land crossed by the pipeline even though the record contained no evidence as to the amount of gas which was or might be used by those customers, the court stating:

> A finding of substantial interference with interstate commerce is unnecessary to a determination of this case.

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[6]The Master further stated:

> The issue eventually to be resolved is whether the First Use Tax is just one of the many factors affecting the price, some of which are beyond FERC control, or whether it is a substantial hindrance to the Commission's powers. *Id.*

Since, as the Master recognized, the First Use Tax infringes upon the Commission's ratemaking responsibilities under the Natural Gas Act and since the areas entrusted to the Commission's responsibility are exclusive, it follows that no evidentiary hearing is needed to establish that this attempt on the part of Louisiana to foster its local interests at the expense of the customers in the remainder of the nation violates the Supremacy Clause.

C. The Validity Vel Non Of The State's Action Absent The Federal Regulatory Scheme Is Irrelevant.

The Master's recommendation of evidentiary hearings apparently is based, *inter alia*, on the simplistic conclusion that the First Use Tax is within the sphere of permissible state regulation because it is a tax. But the critical inquiry is not whether the legislation constitutes an exercise of the state's admitted power to tax, but whether the legislation infringes upon the exclusive domain of the Commission to regulate the interstate transportation and sale for resale of natural gas. In *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84 (1963), the Court invalidated a ratable take order of the Kansas Commission, despite the fact that the order was issued pursuant to the state's admitted conservation powers. What was said there is equally applicable here:

> [T]he problem of this case is not as to the existence or even the scope of a State's power to conserve natural resources; the problem is only whether the Constitution sanctions the particular means chosen by Kansas to exercise the conceded power if those means threaten effectuation of the

federal regulatory scheme. 372 U.S. at 93. *See also Perez v. Campbell*, 402 U.S. 637, 651-52 (1971).

The Court further recognized that even an indirect infringement will result in preemption. *Id.* at 91.

Thus, it is no answer to our contentions here that states may impose severance taxes on local production. As noted, see pp. 13-14, *supra*, production is an area reserved for state regulation, so that a tax on production typically would not infringe upon the federal regulatory scheme. The First Use Tax, however, does infringe upon the federal scheme since it involves an area reserved exclusively for *federal* regulation—the interstate transportation and sale for resale of natural gas.

Similarly, the First Use Tax is invalid even if some of the "uses" taxed by Louisiana might be regarded as separate local incidents, since the statute in either case directly *or indirectly* infringes upon the Commission's sphere of exclusive jurisdiction. Moreover, even though it is irrelevant whether the "uses" taxes are separate local incidents, it should be noted that the transportation onshore of natural gas produced from the federal outer continental shelf is *by definition* in interstate commerce. 15 U.S.C. §3301(18). *See also Continental Oil Co. v. F.P.C.*, 370 F.2d 57, 66 (5th Cir. 1966).

Furthermore, courts have repeatedly held that the movement of natural gas across state boundaries (without regard to the federal outer continental shelf) is in interstate commerce throughout its journey "from the wellhead to the consumer's burner tip," and hence that the Commission's sphere of regulation extends to natural gas as it is produced at the wellhead irrespective of other hydrocarbons, components or impurities with

which it may be mixed as it comes out of the ground. *Deep South Oil Co. v. F.P.C.*, 247 F.2d 882 (5th Cir. 1957) and related cases.[7] *See also United Gas Improv. Co. v. Continental Oil Co.*, 381 U.S. 392, 402 (1965); *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 369 (1965); *Saturn Oil & Gas Co. v. F.P.C.*, 250 F.2d 61 (10th Cir. 1957), *cert. denied*, 355 U.S. 930 (1958).

As the Sixth Circuit recently stated in upholding the Commission's assertion of jurisdiction over sales made from field gathering lines:

> The unprocessed hydrocarbons, of course, are not precisely the same product that reaches Pennsylvania and West Virginia consumers through the high pressure transmission lines of the Kentucky West Virginia Company. Yet the difference in the nature of the gas is not significant in determining the applicability of federal regulation. The ultimate sale in other states of a substantial part of the producer's natural gas output invokes federal jurisdiction over the entire volume of production . . . the natural gas here at issue begins its journey in interstate commerce at the wellhead. *Public Service Comm'n of Kentucky v. F.E.R.C.*, 610 F.2d 439, 444 (1979). (Citations omitted).

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[7] *Shell Oil & Gas Co. v. F.P.C.*, 247 F.2d 900 (5th Cir. 1957), *cert. denied*, 355 U.S. 930 (1958); *Continental Oil Co. v. F.P.C.*, 247 F.2d 904 (5th Cir. 1957); *Humble Oil & Refining Co. v. F.P.C.*, 247 F.2d 903 (5th Cir. 1957), *cert. denied*, 355 U.S. 930 (1958).

II.

AS A MATTER OF LAW THE FIRST USE TAX IS PREEMPTED BY THE OUTER CONTINENTAL SHELF LANDS ACT.

The Master correctly determined that resolution of the conflict between the First Use Tax and the Outer Continental Shelf Lands Act ("OCSLA") does not require an evidentiary hearing. However, the Master erred in failing to find that the First Use Tax is in direct conflict with and thus preempted by the provision of the OCSLA which expressly prohibits state taxation of the natural resources of the federal outer continental shelf. 43 U.S.C. § 1333(a)(2)(A) and (a)(3). That a conflict exists between the OCSLA and the First Use Tax is amply demonstrated by the Pipeline Companies' Brief at 42-54.

The Master erroneously relies on *Portland Pipe Line Corp. v. Environmental Improvement Comm'n*, 307 A.2d 1 (Me. 1973), *appeal dismissed*, 414 U.S. 1035 (1973), to support his suggestion that the First Use Tax is not a tax on natural gas, but rather is a tax on "uses" performed within Louisiana. Report at 30. But in *Portland Pipe Line*, the court held that the license fee there involved was imposed on the activity of offloading oil, rather than upon the oil itself, finding it significant that over the long run, the fee was *not* related to volume but only to the hazard of overwater oil transportation. 307 A.2d at 34. Thus, while the license fee was measured by the volume of oil transferred over water during the licensing period, the fee was to be used *exclusively* for the creation and maintenance of a coastal protection fund, and the fund was limited to four million dollars, with the fee to be

reduced once the four million dollar limit was reached, to a level sufficient to maintain the fund.

In contrast, not only is there no limit upon the amount collected under the First Use Tax, but the use of funds collected is not restricted to repair the damage allegedly done by the pipelines' federal outer continental shelf activities. Rather, the First Use Tax is imposed, without restriction in time or magnitude of the revenues, on the total volumes of outer continental shelf gas moving in interstate commerce within Louisiana. Looking beyond form to substance, it is clear that the First Use Tax is Louisiana's attempt to impose a severance tax on federal outer continental shelf gas, and as such, it is expressly prohibited by the OCSLA. *Cf. Western Union Telegraph Co. v. Kansas*, 216 U.S. 1 (1910); *Delaware L. & W. R. Co. v. Pennsylvania*, 198 U.S. 341 (1905); *Citroen Cars Corp. v. New York Dep't of Finance*, 332 N.Y.S.2d 882-87, 283 N.E.2d 758, 761 (1971).

Moreover, unlike *Portland Pipe Line*, there is a question of federal supremacy here and hence, the state's right to protect its own interests—the holding in *Portland Pipe Line* further cited by the Master (Report at 30)—is irrelevant in light of the established principle that such state rights must give way to pervasive federal regulatory schemes. *See, e.g., Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84, 93-94 (1963).

III.

AS A MATTER OF LAW THE FIRST USE TAX IS PREEMPTED BY THE OUTER CONTINENTAL SHELF LANDS ACT AND THE COASTAL ZONE MANAGEMENT ACT.

The OCSLA and the Coastal Zone Management Act ("CZMA") set out a comprehensive legislative program which seeks to assure prudent management of the nation's coastal zone while encouraging offshore energy exploration and production. The pipeline companies have shown that the First Use Tax impinges on that program. *See* Pipeline Companies' Brief at 56. The Master correctly identified the CZMA as one of the statutes involved in the motions for judgment on the pleadings, but he failed to address or resolve the interference of the First Use Tax with the OCSLA-CZMA programs.

The statutory language and the legislative history of the OCSLA and CZMA reveal the comprehensive manner in which Congress sought to balance and promote the competing interests of energy self-sufficiency and effective management of the coastal zone. 43 U.S.C. § 1332(4) and 16 U.S.C. § 1451(g)(j), as amended by Pub. L. 96-464, § 2(2) (October 17, 1980). Congress declared after the Arab oil embargo of 1973 that energy self-sufficiency was of paramount importance. It was acknowledged, however, that the goal of accelerating outer continental shelf energy activities could have an adverse effect on the coastal management efforts, which had been promoted by the CZMA. Accordingly, in 1976 Congress sought to revise the CZMA so as to foster energy production while protecting coastal management efforts.

Through the hearings on the amendments to the CZMA in 1976 and the OCSLA in 1978, representatives

of the State of Louisiana as well as other coastal states advocated that they be authorized to share in outer continental shelf revenues. They repeatedly urged that Congress amend the OCSLA so as to provide concurrent jurisdiction over resources development beyond the 3-mile limit. *See* Pipeline Companies' Brief at 58. Louisiana sought congressional approval either to tax the resources severed from the outer continental shelf or to share in revenue therefrom as compensation for the impacts of outer continental shelf activities.[8] Nevertheless, Congress expressly rejected this approach.[9] Congress not only continued to adhere to the jurisdictional division of proprietary interests articulated in this Submerged Lands Act,[10] but also prohibited any state participation in outer continental shelf revenue-sharing. It was recognized that unfettered revenue-sharing with little or no reference to prudent planning and management of the coastal zone would have devastated the intent of the CZMA of 1972.[11] Therefore, as an alternative to revenue-sharing with the coastal states, Congress amended the CZMA in 1976 so

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[8]Outer Continental Shelf Oil & Gas Developments: Hearings before Subcommittee on Minerals, Materials and Fuel (May 10, 1976) 94th Cong. at 675-683 (Statement of William Guste, Att. Gen. of La.)

[9]Congress rejected H.R. 3981 in 1976 which would have directed 10% of federal revenues to the Coastal Energy Impact Program. *See* H.R. Rep. 94-878, 94th Cong. 78 (1976). *See also* H.R. Rep. 95-590, 95th Cong. 2nd Sess. 195, *reprinted in* (1978) U.S. Code Cong. & Ad. News 1600-1601.

[10]H.R. Rep. No. 96-1012, 96th Cong. 2nd Sess. 26-27 (1980).

[11]H.R. Rep. 95-590, 95th Cong. 2nd Sess. 196, *reprinted in* (1978) U.S. Code Cong. & Ad. News 1601.

as to establish the Coastal Energy Impact Program ("CEIP").[12]

The CEIP was created to recompense coastal states for impacts associated with outer continental shelf energy development and production. This program compensates coastal states for the costs of public facilities and public services[13] and for the prevention, reduction, or amelioration of any unavoidable loss of valuable environmental or recreational resources resulting from coastal energy activities. 16 U.S.C. §1456a (b)(5)(C). *See* Pipeline Companies' Brief at 57 and 58 for a description of the broad compensation provided to eligible states impacted by coastal energy activities. The compensatory nature of the CEIP is demonstrated by the manner in which CEIP compensation is computed. Eligiblity for CEIP grants is premised on a formula which computes, as one of its three elements, the volume of outer continental shelf gas first landed in the state—the same basis for calculating the First Use Tax. The CEIP, however, more accurately reflects outer continental shelf impacts since it includes in the formula the volume of both outer continental shelf oil and gas coming ashore. The other two elements of the CEIP are the volume of oil and gas produced adjacent to the state and the outer continental shelf acreage

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[12]The Office of Coastal Zone Management recently completed an evaluation of the CEIP. In the text, it was noted that the formula grant aid (CEIP formula) was intended by Congress to provide "equity" or compensation in lieu of taxes to coastal states. *See* 11 Coastal Zone Management 1 (October 22, 1980).

[13]The term "public facilities and public services" is defined in 16 U.S.C. §1453(15), as amended by the Coastal Zone Management Improvement Act of 1980, Pub. L. 96-464, §4(1).

newly leased by the federal government adjacent to the coastal state. 16 U.S.C. §§1456a(b)(2)(A), (B) & (C). Thus, states are compensated in direct proportion to adjacent federal offshore outer continental shelf activities; however, they are ineligible for this compensation if they do not comply with the mandates of the CZMA.[14]

Just this year, Congress reaffirmed its intent that states strictly adhere to federal coastal management objectives in order to receive compensation for outer continental shelf impacts.[15] Congress clarified that CZMA criteria must be contained in a state's coastal management plan if that state is to be eligible to receive CEIP funds.[16] 16 U.S.C. §1452(2), as amended by the Coastal Zone Management Improvement Act of 1980, Pub. L. 96-464, §3. Absolute adherence to the CZMA objectives is so essential that now even federal agencies must identify all activities which may be inconsistent

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[14]Congress recently reaffirmed that eligibility for outer continental shelf impact funds is inseparable from participation in the federal coastal zone management program. To put to rest the controversy which had arisen between Georgia and the Office of Coastal Zone Management as to whether Georgia's withdrawal from the CZMA program rendered it ineligible to receive coastal energy impact assistance, Congress directed that after notice, program monies and CEIP funds be withdrawn from states which failed to adhere to an approved program or deviated from the terms of the program grant. Coastal Zone Management Improvement Act of 1980, Pub. L. 96-464 §9 (October 17, 1980).

[15]Since the September 15 report of the Special Master, the CZMA has been amended. *See* Pub. L. 96-464, the Coastal Zone Management Improvement Act of 1980 (October 17, 1980).

[16]The purpose of this clarification was to foster uniformity in state management programs. 126 Cong. Rec. H10109 (Daily ed. Sept. 30, 1980) (Remarks of Rep. Studds).

with coastal management objectives and take steps to resolve these conflicts. 16 U.S.C. §§ 1452(4) and 1452(c), as amended by the Coastal Zone Management Improvement Act of 1980, Pub. L. 96-464 §§ 3 & 10(3) (October 17, 1980). To assure continued adherence to CZMA objectives, the Secretary of Commerce is directed to report to Congress annually regarding any federal actions or state management plans which may be inconsistent with coastal management objectives. 16 U.S.C. §§ 1458 and 1462, as amended by the Coastal Zone Management Improvement Act of 1980 §§ 9 & 10, Pub. L. 96-464 (October 17, 1980).

The First Use Tax obviously undermines the intent of the CZMA and the OCSLA. Clearly, coastal states are provided CEIP funds in lieu of their participation in outer continental shelf revenue-sharing. To assure continued viability of CZMA objectives, states are only eligible for CEIP funds if they participate in CZMA.[17] If Louisiana is allowed to continue to amass large sums based on the amount of outer continental shelf gas first landed in the state in furtherance of its own interests, the First Use Tax will not only duplicate the compensation already provided in the CZMA, but it will also stand "as an obstacle to the accomplishment and the execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

The First Use Tax is clearly repugnant to the OCSLA-CZMA scheme since it provides compensation to Louisiana in derogation of manifest congressional intent thst

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[17] Although participation by a state in the CZMA program is voluntary, states may not receive CEIP funds without an approved coastal management program. Louisiana has chosen to be governed by the CZMA and to be subject to both the benefits and the responsibilities intrinsic to that act. 45 Fed. Reg. 64615 (September 30, 1980).

CZMA impact funds provide the exclusive compensation for outer continental shelf impacts. Additionally, it frustrates the intent of Congress that expenditures of funds derived from outer continental shelf impacts be absolutely tied to CZMA participation.

The State of Louisiana agreed in its response to the brief filed on behalf of the pipeline companies that Congress addressed adverse outer continental shelf impacts on coastal states through creation of the CEIP. *See* Louisiana Brief at 15. Louisiana, however, complained that the program was underfunded. This claim, if credible, is for Congress alone to resolve.

IV.

NO EVIDENTIARY HEARING IS NECESSARY FOR THE COURT TO HOLD THAT THE FIRST USE TAX UNLAWFULLY DISCIRMINATES AGAINST INTERSTATE COMMERCE.

The pipeline companies have advanced three distinct arguments in support of their contention that no evidentiary hearing is necessary to hold that the First Use Tax discriminates against interstate commerce. *See* Pipeline Companies' Brief at 71-81. *See also* Plaintiffs' Brief at 31-34.

The Master apparently agrees that the First Use Tax is discriminatory. After discussing the interplay between the First Use Tax and the Severance Tax Credit, La. R.S. 47:647, he concluded that the taxing scheme "obviously aids an intrastate operation in a way not available to a pipeline engaged only in interstate transportation or producing gas outside of Louisiana." Report at 34. Similarly, he found that, as a result of the tax credit to Louisiana utilities and direct consumers of gas subject to the First Use Tax, La. R.S. 47:11, "Louisiana customers of local utilities and local

consumers buying directly from the pipelines are protected in the whole or in part from the incidence of the tax which is passed on to consumers out of the state." *Id.* at 34. Nonetheless, the Master concluded that "it would be desirable to withhold a conclusion until the issues can be tested against facts developed in an evidentiary hearing." *Id.* at 21. It is submitted that the Master's conclusion is premised on two errors.

The Master first erred in concluding that a hearing is needed to determine "what adjustments can be made in the base prices, and what allowances can be made between buyers and sellers which might reduce or eliminate any disadvantage of one over the other." *Id.* at 35. This misconstrues the law. The Court has never required an interstate business to adjust its prices or make allowances to its customers to rectify the competitive imbalance created by a state tax.

The Court has instead inquired whether the taxing scheme under consideration will operate, by its very terms, to discriminate against interstate commerce. *See, e.g., Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977) (rendered on appeal of judgment granting motion to dismiss). If such facial discrimination is found, no further inquiry is needed because *a fortiori* the tax must discriminate in operation.

The Master found that the tax discriminates on its face. That should have ended the inquiry. Instead, he recommends that a hearing be held to determine whether this facially unconstitutional statute can be saved by the actuality of its operations. No statute found to be facially discriminatory has heretofore been saved from invalidity by a consideration of its practical operations.

Clearly, no evidentiary hearing is required for the following determinations:

First, the tax discriminates against interstate commerce because it is imposed solely on gas originating outside Louisiana's boundaries. It thus discriminates in favor of the owners of gas produced within its borders, even though such gas is subject to the same activities defined in the statute as "uses."[18] *Philadelphia v. New Jersey*, 437 U.S. 617, 626-627 (1979). *See* Pipeline Companies' Brief at 71-75. *See also* Plaintiffs' Brief at 32-34.

Second, the First Use Tax, in conjunction with the Severance Tax Credit, discriminates against interstate commerce because the credit effectively eliminates the economic burden of the tax on owners of outer continental shelf gas who also produce natural resources in Louisiana, thereby discriminating against the pipelines which do not engage in such production. *See* Pipeline Companies' Brief at 76-78. *See also* Plaintiffs' Brief at 34.

Third, the First Use Tax in conjunction with the tax credit for in-state electric and natural gas utility service and various exemptions for in-state uses of gas otherwise subject to the tax, La. R.S. 47:1303(a), discriminates against interstate commerce by imposing the entire economic burden of the tax on consumers in other states. *See* Pipeline Companies' Brief at 78-81;

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[18]For example, gas produced two miles offshore, in Louisiana waters, is not subject to the tax, while gas produced four miles offshore, from the federal outer continental shelf, is subject to the tax, notwithstanding that the gas in each case is brought onshore, is subjected to the same activities and imposes exactly the same alleged burdens on the State of Louisiana.

See also Plaintiffs' Brief at 34. As a result, local gas consuming industries will enjoy a competitive advantage over such industries located in other states.[19] *See, e.g., Best & Co. v. Maxwell*, 311 U.S. 454, 456-457 (1940); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 334 n.13 (1977).

The Master also erred in concluding that an evidentiary hearing is needed because "the 'actuality of operation' may show that the tax is a 'compensating' tax intended to complement the state severance tax as the use tax complemented the sales tax in *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937)." Report at 35. However, no such evidentiary hearing is needed. As is obvious from an examination of the respective statutes, the First Use Tax cannot "complement" the state severance tax as a matter of law.

The traditional use tax complements a sales tax by insuring that the same activities, purchases at retail, will be subject to an equal tax burden regardless where the purchase is made, thereby placing the same in-state and out-of-state activities on an equal competitive footing. *See Henneford v. Silas Mason Co.*, 300 U.S. 577, 581 (1937); *International Harvester Co. v. Dep't of Treasury*, 322 U.S. 340, 347-348 (1944).

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[19]For example, Company A, located in Louisiana, manufactures a product in competition with Company B, located in another state. Both companies annually consume 10,000,000 mcf of natural gas produced from the outer continental shelf in their operations. Because of the First Use Tax, Company B will have increased expenses of $700,000, but Company A will suffer no increase in expenses by virtue of the First Use Tax. The competitive disadvantage suffered by Company B, solely because of the Louisiana tax, is obvious.

By contrast, the First Use Tax cannot be considered a "compensating" tax with respect to the state severance tax, since the activities taxed by, and the situations of the taxpayers under, the two taxes are radically different.[20] Under Louisiana's theory, the First Use Tax is imposed on federal outer continental shelf gas when it is first subjected to one of the activities defined as "uses" in the statute; whereas the severance tax is imposed on Louisiana gas as a result of the severing of such gas from the soil or water-bottoms within the state.

Moreover, the severance tax is "an excise tax upon the privilege of severing resources" from within Louisiana's borders, and is premised upon the State's "inherent power . . . to regulate the severance of its natural resources." *State v. Standard Oil Co. of Louisiana*, 178 So. 601, 610, 626 (La. 1938). The first Use Tax, on the other hand, is imposed to compensate Louisiana for the alleged costs incurred by the state in providing services and support to the outer continental shelf gas pipeline industry and the alleged environmental damage caused to the state coastal areas by such industry. La. R.S. 47:1301C.

In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), the Court articulated the test for the validity of a use or compensating tax:

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[20]If the First Use Tax were a true compensating tax with respect to the severance tax, and as such, a tax on the privilege of severing resources from the outer continental shelf, it would be the sort of tax expressly prohibited by the OCSLA. *See* pp. 22-23, *supra*.

> Equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state. 373 U.S. at 70.

Under *Halliburton*, a prerequisite for the validity of a compensating tax is the existence of similarly situated taxpayers under each taxing scheme.[21] In the instant case, there is no similarity whatever between the taxpayers under the First Use Tax and the severance tax, and the two taxes cannot be complementary. Just as the Court in *Halliburton* found it impermissible to justify the imposition of a use tax by comparing the activities of a manufacturer-user to those of a user purchasing at retail, 373 U.S. at 71-72, Louisiana cannot legally justify the imposition of the First Use Tax by comparing the activities of the pipeline companies in transporting federal outer continental shelf gas to the production activities of in-state producers of gas and other minerals.[22]

Even if the First Use Tax could properly be considered as compensating for the severance tax, it is clear that the taxing scheme represented by the First Use Tax and its companion statutes does not so

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[21] Of course, *Halliburton* also requires equal treatment of similarly situated taxpayers. Since the taxpayers are not similarly situated in the present case, it is not necessary to consider whether they have been given equal treatment.

[22] The true similarity of situation for severance tax purposes is that existing between producers of outer continental shelf gas and producers of Louisiana gas. However, by the terms of the statute itself, the piplines are prohibited from obtaining reimbursement of their tax payments from the federal outer continental shelf gas producers from whom they buy their gas. La. R.S. 47:1303C.

compensate. A tax compensates for another tax when it eliminates a competitive imbalance which would otherwise exist. *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). This is the supposed reason why the First Use Tax is not imposed on Louisiana produced gas. However, the Severance Tax Credit and the various credits and exemptions for in-state consumers are not addressed to a supposed need for equalization; rather, they create a prohibited economic imbalance.

The Severance Tax Credit effectively relieves producers of Louisiana natural resources, which also own federal outer continental shelf gas subject to the First Use Tax, of the economic consequences of their First Use Tax obligation. It therefore creates an economic advantage in favor of one class of outer continental shelf gas owners (the producers), to the disadvantage of another class of outer continental shelf gas owners (the pipeline companies). Similarly, the various credits and exemptions for in-state consumers create an economic advantage for Louisiana residents and industries, by effectively shielding them from the impact of the tax.

In the final analysis, the taxing scheme formed by the First Use Tax and its companion statutes represents Louisiana's attempt to use its favored position as a coastal state to obtain revenues exclusively from the citizens of other states. Louisiana clearly is prohibited from thus "project[ing] the taxing power of the state plainly beyond its borders." *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 365 (1940). Moreover, this is precisely the kind of tax which invites retaliatory taxation by other states and which the Commerce Clause was designed to prevent. *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318

(1977); *Austin v. New Hampshire*, 420, U.S. 656, 662 (1975).

V.

NO EVIDENTIARY HEARING IS NEEDED TO HOLD THAT THE FIRST USE TAX CREATES THE RISK OF MULTIPLE TAXATION.

The Master rejects the claim that the First Use Tax exposes the pipeline companies to the burden of multiple taxation and therefore violates the Commerce Clause. Report at 35-37. He recognizes that "the tax is on the total amount of natural gas within the State and subject to use there," but nevertheless asserts:

> Just as a sales tax, or a severance tax, is imposed on the total amount of the commodity sold or produced, so it would seem appropriate to levy a use tax on the total amount involved. *Id.* at 35, 36.

In so urging, the Master ignores the First Use Tax's "beggared" nature of definition of "use." *Cf. Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 161 (1954). Unlike severance and use taxes where the taxable event can occur only once, so that taxing the total amount of the commodity does not create a risk of multiple taxation, there is no such limitation upon the occurrence of non-consumptive "uses" as defined in the First Use Tax. To the contrary, the gas subject to the tax unavoidably is subjected to "uses" as defined in the statute in one or more of the several states which it traverses during its interstate journey beyond Louisiana

to the ultimate consumers. *See* Pipeline Companies' Brief at 64-65.[23]

Accordingly, the First Use tax fits squarely within the holding of *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954). In that case, Texas had imposed a tax on "gathering" gas measured by the entire volume of gas "taken," and the taxable incident was the pipeline company's taking of the gas from the outlet of a processing plant in Texas for immediate interstate transmission. The Court set the tax aside as impermissible under the Commerce Clause for the reason, *inter alia*, that it would permit a multiple burden upon interstate commerce:

> for if Texas may impose this "first taking" tax measured by the total volume of gas so taken, then Michigan and the other recipient states have at least equal right to tax the first taking or "unloading" from the pipeline of the same gas when it arrives for distribution. 347 U.S. at 170.[24]

Since, as just indicated, the pipeline companies, in the normal course of their operations, subject the gas to "uses" in states other than Louisiana, no evidentiary hearing is necessary to justify the conclusion that under *Calvert*, the tax exposes the pipeline companies to the risk of multiple taxation.

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[23]In addition to transporting gas in interstate commerce, the pipeline companies typically sell it to distribution companies to which they transfer possession and/or relinquish control at the point of delivery. These activities embody a number of "uses" as defined in the statute.

[24]The Court has expressly reaffirmed this facet of *Calvert* in *Department of Revenue of Washington v. Ass'n of Washington Stevedoring Companies*, 435 U.S. 734, 749 n.18 (1978).

The Master discusses, but misconstrues *Calvert*. After noting that most of the activities defined as "uses" in the statute are "too intimately connected with interstate commerce to survive," Report at 36, the Master declines to recommend that the tax be declared unconstitutional because he believes that there is a "dispute" between the parties concerning the legal significance of processing which requires an evidentiary hearing to resolve. *Id.* at 37.

However, no evidentiary hearing is needed because, as a matter of law, processing is merely another aspect of the transportation of the gas from the wellhead to the burner tip and does not interrupt the continuous flow of the gas. *Deep South Oil Co. v. F.P.C.*, 247 F.2d 882 (5th Cir. 1957). *See also* pp. 21-22, *supra*.

CONCLUSION

For the foregoing reasons the Court should reject the recommendation of the Special Master that the motions for judgment on the pleadings should be denied. Instead, the Court should hold (1) that Louisiana's First Use Tax is void on its face under the Supremacy Clause for infringement upon the pervasive federal regulatory schemes provided by Congress in the Natural Gas Act, the Natural Gas Policy Act, the Outer Continental Shelf Lands Act, and the Coastal Zone Management Act, and (2) that the tax is void on its face under the Commerce

Clause because it unlawfully discriminates against interstate commerce in favor of local interests and improperly exposes the pipeline company taxpayers to the risk of multiple taxation.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF MARYLAND, ET AL., PLAINTIFFS

v.

STATE OF LOUISIANA

ON THE REPORT OF THE SPECIAL MASTER OF SEPTEMBER 15, 1980

EXCEPTION OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AND BRIEF IN SUPPORT OF EXCEPTION

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The United States and the Federal Energy Regulatory Commission respectfully except to the Report of the Special Master dated September 15, 1980, insofar as he recommends that the plaintiffs' motion for judgment on the pleadings be denied.

WADE H. MCCREE, JR.
Solicitor General

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OCTOBER TERM, 1980

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v.

STATE OF LOUISIANA, ET AL.

ON THE REPORT OF THE SPECIAL MASTER OF SEPTEMBER 15, 1980

BRIEF FOR THE UNITED STATES AND THE FEDERAL REGULATORY COMMISSION IN SUPPORT OF EXCEPTION

QUESTIONS PRESENTED

1. Whether the pleadings establish that the Louisiana First Use Tax on Natural Gas is invalid under the Supremacy Clause of the United States Constitution because it conflicts with the exclusive statutory jurisdiction of the Federal Energy Regulatory Commission to regulate the sale and transportation of natural gas in interstate commerce, and to apportion costs among producers, processors, and consumers.

---

* Plaintiffs are the States of Maryland, Illinois, Indiana, Michigan, New York, Rhode Island, Wisconsin, and the Commonwealth of Massachusetts. Plaintiffs sue "in their proprietary capacities as substantial purchasers of natural gas" subject to the First Use Tax,

2. Whether the pleadings establish that the Louisiana First Use Tax violates the Commerce Clause of the United States Constitution.

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and in their *parens patriae* capacities on behalf of their citizens who will purchase such gas (Complaint 6-7 ¶ III). Subsequent to the Court's granting of the plaintiffs' Motion for Leave to File the Complaint, New Jersey filed a motion for leave to intervene, to file a complaint, and a brief in support thereof. Seventeen interstate natural gas pipeline companies also sought leave to intervene. In addition, a motion for leave to file a brief amicus curiae and the brief were filed on behalf of Associated Gas Distributors.

On March 3, 1980, the Court appointed a Special Master to whom all pending motions were referred. Thereafter, the United States and the Federal Energy Regulatory Commission moved for leave to intervene. On May 14, 1980, the Special Master recommended: (1) that the motions of New Jersey for leave to intervene and file its complaint be granted; (2) that the motion of the United States and the Federal Energy Regulatory Commission to intervene as plaintiffs be granted; (3) that the 17 pipelines be permitted to intervene, reserving the final determination of the applicability of the Eleventh Amendment until the final decision of the case; and (4) that the motion of the Associated Gas Distributors for leave to file a brief amicus curiae in support of the plaintiffs' motion for judgment on the pleadings be granted. The parties have previously filed exceptions and briefs with respect to the Report of the Special Master on these motions for leave to intervene and to appear as amicus curiae.

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JURISDICTION

The motion for leave to file a complaint invoking the original jurisdiction of this Court was granted on June 18, 1979. The jurisdiction of this Court rests on the Constitution of the United States, Article III, Section 2, Clauses 1 and 2, and 28 U.S.C. 1251(a)(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clause 3 ("Commerce Clause"), and Article VI, Clause 2 ("Supremacy Clause") of the Constitution of the United States are set forth at page 4 of the Plaintiffs' Brief in Support of Motion for Judgment on the Pleadings, filed on September 18, 1979.

The First Use Tax on Natural Gas, La. Rev. Stat. Ann. §§ 47:1301-47:1307 (West Supp. 1980), the First Use Tax on Natural Gas—Severance Tax Credit, La. Rev. Stat. Ann. § 47:647 (West Supp. 1980), the First Use Tax Trust Fund, La. Rev. Stat. Ann. § 47:1351 (West Supp. 1980), and the Tax Credit to Operators of Electric Generating Plants and Natural Gas Distribution Services, La. Rev. Stat. Ann. § 47:11 (West Supp. 1980), are set forth at pages 1a-20a in the Appendix to Plaintiffs' Brief in Support of Motion for Judgment on the Pleadings, filed on September 18, 1979.

Sections 4, 5, and 7 of the Natural Gas Act of 1938, 15 U.S.C. 717c, 717d, and 717f, and Sections 2(18), 110, 121(b), and 601 of the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. II) 3301(18), 3320, 3331(b), and 3431, are set forth at pages 1a-9a in the Appendix to the Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae, filed on November 20, 1979.

STATEMENT

A. Introduction

This litigation was initiated last year by the plaintiff States to obtain a declaratory judgment that the Louisiana First Use Tax on Natural Gas [1] is unconstitutional and an order permanently restraining the collection of the tax and compelling the refund of all revenues collected plus "all interest earned on such revenues" (Complaint 6 ¶ II).

In our brief amici curiae of June 1979 in support of the plaintiffs' motion for leave to file a complaint and our brief amici curiae of November 1979 in support of the plaintiffs' motion for judgment on the pleadings, we advised the Court that both the United States and the Federal Energy Regulatory Commission have a substantial and immediate interest in this case. Louisiana is presently collecting at least $225 million per year under its First Use Tax on Natural Gas. As a consumer of natural gas in the operation of military and civilian installations, the United States, like the citizens of the plaintiff states, is directly affected by the additional costs imposed by the First Use Tax.

Moreover, the First Use Tax directly conflicts with the authority of the Federal Energy Regulatory Commission to regulate the interstate sale and transportation of natural gas. Although couched in terms of a tax on the "use" of natural gas, the principal impact of the levy is to increase the price of gas extracted from federal lands (primarily submerged lands of the Outer Continental

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[1] Act No. 294, 1978 La. Sess. Law Serv. 482 (West), codified as La. Rev. Stat. Ann. §§ 47:1301-47:1307 (West Supp. 1980). Hereinafter, the various provisions of the act will be referred to by the section number used in the codification, and the act itself will be referred to as the "First Use Tax" or the "Act."

Shelf) or from federally-leased areas, when such gas is shipped through Louisiana in interstate commerce. Since Congress vested in the Federal Energy Regulatory Commission the exclusive authority to set rates for the sale and transportation of such natural gas in interstate commerce, the Louisiana tax is incompatible with the federal regulatory scheme.

Finally, as the Special Master correctly observed (Report 31), if protracted proceedings in this case ensue, "Louisiana stands to gain materially by continuing to collect a quarter of a billion dollars a year which, under its provisions for the refund of taxes paid under protest, would be repaid with only 6% interest, whereas the current value of this enormous fund would be far greater than 6%. It is desirable, therefore, to reduce the delay in deciding this case or to eliminate the profit to Louisiana from the delay" (footnote omitted).[2]

There is indisputably a compelling need for a prompt decision on the merits in this case. But, contrary to the Special Master's conclusion, we submit that the pleadings contain all of the facts necessary for a determination of the validity of the First Use Tax. The prospect for substantial unjust enrichment by Louisiana therefore calls for addressing plaintiffs' motion for judgment on the

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[2] Representative Tauzin, the sponsor of the First Use Tax, candidly explained Louisiana's attempt to profit from an unconstitutional tax as follows:

> So that the total amount that we might be liable for in the event that we should lose the litigation is available for refund at 6% interest. We are likely to make more than 6% interest on it in investments. We are actually going to probably come out a little bit ahead on it.

Hearings on H.B. 768 Before the Revenue and Fiscal Affairs Committee of the Louisiana Senate 6 (June 26, 1978). See also *"1st-Use Tax Will Profit La. Even If Cash Is Returned,"* The Times Picayune/The States-Item, Oct. 7, 1980, § 1, at 17.

pleadings without the delay inherent in the further factual hearings recommended by the Special Master.

To be sure, we share the Master's concern that "the chance of an erroneous decision can be materially reduced by permitting the parties to present a factual record" (Report 21-22). But, as we shall show, the facts of this case, as set forth in the pleadings, are no different from those of many other cases in which the Court has determined the constitutional validity of state taxes under the Supremacy and Commerce Clauses. We therefore respectfully except to the Special Master's recommendation that further evidentiary hearings be held and submit that the plaintiffs' motion for judgment on the pleadings be granted.

B. The Nature of the Louisiana Tax

The First Use Tax Act imposes a tax of seven cents per thousand cubic feet (subject to certain exclusions) upon the first "use" within Louisiana of any natural gas that is not subject to any severance or production tax levied by Louisiana or any other state or territory of the United States, or is not subject to any import tax or tariff levied by the United States on imports from foreign countries. La. Rev. Stat. Ann. § 47:1303 A (West Supp. 1980) (Mot. App. 4a-5a).[3]

The Act imposes the First Use Tax on the owner when the gas is first subjected to a taxable use in Louisiana. La. Rev. Stat. Ann. §§ 47:1302(9), 47:1303 (West Supp. 1980) (Mot. App. 4a-6a).[4] The term "use" is defined broadly as "[1] the sale; [2] the transportation in [Louisiana] to the point of delivery at the inlet of any process-

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[3] "Mot. App." refers to the Appendix to the Plaintiffs' Motion for Judgment on the Pleadings.

[4] La. Rev. Stat. Ann. § 47:1302(9) (West Supp. 1980) (Mot. App. 4a) defines "owner" as "the person or person [*sic*] having title to and the right to alienate the natural gas subject to the tax at the time a use occurs in [Louisiana except] any person to whom temporary possession or control has been transferred. In the event of a sale the purchaser shall be deemed the owner."

ing plant; [3] the transportation in [Louisiana] of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; [4] transfer of possession or relinquishment of control at a delivery point in [Louisiana]; [5] processing for the extraction of liquefiable component products or waste materials; [6] use in manufacturing; [7] treatment; or [8] other ascertainable action at a point within [Louisiana]." La. Rev. Stat. Ann. § 47:1302(8) (West Supp. 1980) (Mot. App. 4a).[5]

The First Use Tax Act recites that it is "a cost associated with uses made by the owner in preparation of [*sic*] marketing of the natural gas" (La. Rev. Stat. Ann. § 47:1303 C (West Supp. 1980)) and not a tax on the natural gas itself.[6] It also expressly abrogates provisions of existing contracts which underlie and form the basis for certificates of public convenience and necessity issued by the Federal Energy Regulatory Commission concerning the apportionment of taxes among sellers, processors, and purchasers of gas. In this connection, La. Rev. Stat. Ann. § 47:1303 C (West Supp. 1980) (Mot. App. 5a) provides:

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[5] If any enumerated use "first occurring is determined not to be a constitutionally taxable incident, the tax shall be imposed upon the first occurring thereafter." La. Rev. Stat. Ann. § 47:1303 F (West Supp. 1980) (Mot. App. 6a). The Act provides that if the section reciting that the tax is a cost associated with uses made by the owner in preparation or marketing of the gas is held invalid, the entire Act shall be void. Section 4(2), 1978 La. Sess. Law Serv. 486 (Mot. App. 8a). The remaining parts of the Act are severable. Sections 2, 4, 1978 La. Sess. Law Serv. 485, 486 (Mot. App. 7a, 8a).

[6] The First Use Tax statute recites that it is not imposed "on the production, severance, or ownership of natural gas produced outside of the boundaries of the State of Louisiana * * * [and] that the incidence of this tax shall not be upon the natural gas nor upon the property or rights from which it is produced, but rather shall be only upon the privilege of performance or allowing the performance, by the owner of the enumerated actions comprising first use within [Louisiana]." La. Rev. Stat. Ann. § 47:1303 E (West Supp. 1980) (Mot. App. 6a).

> Any agreement or contract by which an owner of natural gas at the time a taxable use first occurs claims a right to reimbursement or refund of such taxes from any other party in interest, other than a purchaser of such natural gas, is hereby declared to be against public policy and unenforceable to that extent. Notwithstanding any such agreement or contract, such an owner shall not have an enforceable right to any reimbursement or refund on the basis that this tax constitutes a cost incurred by such owner by virtue of the separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, or that this tax constitutes any other grounds for reimbursement or refund under such agreement or contract, unless there has been a final and unappealable judicial determination that such owner is entitled to such reimbursement or refund, notwithstanding the public policy and purpose of this part and the foregoing provisions of this Subsection C. In any legal action pursuant to this Subsection, the state shall be an indispensable party in interest.

Thus, when the tax is imposed on a pipeline as an owner, that pipeline may not pass the tax back to a producer but must either bear the tax itself or pass it on to those persons who purchase the gas from the pipeline.

The tax does not apply to all uses of natural gas in Louisiana. Certain uses are exempt from the tax.[7] Moreover, the First Use Tax is not levied on gas subject to a production or severance tax imposed by Louisiana or any other state or any import tax imposed by the United

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[7] The tax does "not apply to natural gas otherwise subject thereto * * * *used* or consumed in the drilling for or production of oil, natural gas, sulphur, or in the processing of natural gas for liquids extraction within [Louisiana]; [or] to gas shrinkage volumes attributable to the extraction of ethane, propane, butanes, natural or casinghead gasoline or other liquefied hydrocarbons * * * [; or] to natural gas used or consumed in the manufacture of fertilizer and anhydrous ammonia within [Louisiana]." La. Rev. Stat. Ann. § 47:1303 A (West Supp. 1980) (Mot. App. 4a-5a) (emphasis added).

States. Almost every state, including Louisiana,[8] has a severance tax. As a result, the major impact of the First Use Tax is on gas produced from the Outer Continental Shelf (OCS), to which state severance taxes do not apply.[9] Indeed, the Louisiana legislature intended that the principal target of the tax would be OCS gas.[10]

What is more, the practical impact of the tax falls on OCS gas that passes through the state because Louisiana allows all electric generating utilities, gas distribution companies, and other persons in Louisiana who purchase natural gas directly from an interstate pipeline a credit against their Louisiana state and local taxes for any increases in the transportation and marketing costs for OCS gas which they purchase.[11] Because Louisiana has characterized the First Use Tax as a cost of transporting and marketing gas (La. Rev. Stat. Ann. §§ 47:1303 C, E (West. Supp. 1980)), this credit allows Louisiana consumers who consume OCS gas otherwise subject to the First Use Tax to offset increased rates for natural gas

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[8] La. Rev. Stat. Ann. §§ 47:631-47:646 (West 1970).

[9] *E.g., Mississippi River Fuel Corp.* v. *Cocreham*, 382 F.2d 929 (5th Cir. 1967), cert. denied, 390 U.S. 1014 (1968); accord, *Humble Pipe Line Co.* v. *Waggonner*, 376 U.S. 369 (1964). See also Outer Continental Shelf Lands Act, Section 4(a)(2), 43 U.S.C. 1333 (a)(2).

[10] See, *e.g., Hearings on H.B. 768 Before the Revenue and Fiscal Affairs Committee of the Louisiana Senate* 3 (June 26, 1978) (Rep. Tauzin). The tax also applies to gas produced from federal enclaves within Louisiana, including Barksdale Air Force Base. Finally, by its terms, the tax is also applicable to gas imported from abroad because the United States does not levy any import taxes upon gas from abroad. See 72 Stat. 72, 19 U.S.C. 1202, Schedule 4, Part 10, Item 475.15. However, Louisiana claims (Brief in Response to Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae 11, 24) that it is not assessing the First Use Tax on imported gas because the United States could impose duties on such gas. See also Answer 19 ¶ LV.

[11] See Act No. 599, Tax Credits to Operators of Electric Generating Plants and Natural Gas Distribution Services, 1978 La. Sess. Law Serv. 1112, codified as La. Rev. Stat. Ann. § 47:11 (West Supp. 1980).

attributable to that tax through reductions in other taxes paid to Louisiana. Indeed, the legislative history shows that the very purpose of the credit is to ensure that Louisiana consumers do not bear any of the costs associated with the First Use Tax.[12]

C. The Proceedings Before the Special Master

During the proceedings before the Special Master, three issues emerged, which are addressed by the second preliminary Report of September 15, 1980, now before the Court.[13] The first is whether the complaint in this case should be dismissed on the motion of Louisiana, filed with the Court on October 22, 1979. Since the Master recommended that the Court deny Louisiana's motion on this score (Report 10-20), we have no occasion to address it at this stage. If (as we anticipate) Louisiana excepts to the Master's ruling, we shall of course respond.

The remaining issues relate to the plaintiffs' motion for judgment on the pleadings on the grounds that the Louisiana First Use Tax is invalid under the Supremacy and Commerce Clauses of the Constitution. These motions were first filed with the Court on September 18, 1979, and, in briefs amici curiae filed in June and November, 1979, the United States and the Federal Energy Regulatory Commission supported the plaintiff States. In the first of those briefs, we urged that the resolution of the constitutional validity of the tax did not require the appointment of a Special Master because there are no

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[12] *Hearings on H.B. 768 Before the Committee on Ways and Means of the Louisiana House of Representatives* 4 (colloquy between Rep. Tauzin and unidentified speakers), 5 (colloquy between Reps. Sour and Bagert), 6 (Rep. Labords) (June 5, 1978).

[13] The Special Master's first preliminary report, filed on May 14, 1980, contained his recommendations with respect to: (1) motions to intervene by New Jersey, the United States and the Federal Energy Regulatory Commission, and 17 pipelines; and (2) a motion to appear as amicus curiae by the Associated Gas Distributors. See pages I-II, note *, *supra*.

genuine issues as to any material facts. In the second brief, we urged that the Court grant the plaintiffs' motion for judgment on the pleadings and hold that the Louisiana tax is unconstitutional. On March 3, 1980, the Court appointed a Special Master and referred the motions for judgment on the pleadings to him (Report 9). After hearing argument by the various parties and amici curiae, the Special Master recommended that the plaintiffs' motion for judgment on the pleadings be denied without prejudice to a reconsideration of the issues raised on the basis of further proceedings (Report 38).

1. *The Supremacy Clause.* The Special Master concluded that the facts disclosed in the pleadings do not, without more, require that the Act be invalidated on the basis of the Supremacy Clause. In so ruling, the Master acknowledged that "the Louisiana first use tax may in fact interfere with the federal regulatory process * * *" (Report 21). But he further observed that "the interference may be so indirect, so peripheral, so subject to administrative adjustments, as to permit the State and federal programs to coexist" (*ibid.*). In the Master's view, "[e]videntiary hearings are necessary to reach a conclusion on these issues" (*ibid.*).

The Master recognized that the Natural Gas Act and the Natural Gas Policy Act vest the Federal Energy Regulatory Commission with exclusive authority to regulate the transportation and sale of natural gas in interstate commerce and that any state law that interfered with the Commission's exclusive jurisdiction would violate the Supremacy Clause. He further observed that the Commission's authority includes the power to allocate costs of processing and transporting liquid and liquefiable hydrocarbons between producers and pipelines (Report 22-23) and that § 47:1303 C of the First Use Tax Act prohibits a pipeline from passing the First Use Tax back to a producer (Report 26-29, 30). But the Master concluded that evidentiary hearings are necessary to determine whether the processing that occurs within Louis-

iana by which the hydrocarbons are extracted changes the nature of the gas so as to justify passing on the First Use Tax on to consumers.

In so holding, the Master rejected our argument that under the decisions of this Court, the Commission has the exclusive authority to allocate costs, and that Louisiana interferes with the Commission's function when it seeks to allot the tax. In the Master's view, "the conflict [between] the Natural Gas Act [and the Louisiana tax] is the type of issue which cannot suitably be resolved on the papers or by reference to past decisions which were not really focused on the issue" (Report 29). Moreover, he concluded that "it may be that in the end FERC's orders can be adjusted so that the laws will mesh without conflict" (*ibid.*). Accordingly, the Master recommended that the Court not grant the plaintiffs' motion for judgment on the pleadings on the basis of the Supremacy Clause (Report 31).

2. *The Commerce Clause.* With respect to the Commerce Clause, the Special Master conceded that "a determination on the validity of the Louisiana tax could be made on the pleadings, plus a generous application of judicial notice" (Report 21). But he suggested that "to reach a conclusion on the papers involves such an application of judgment that it would be desirable to withhold a conclusion until the issues can be tested against facts developed in an evidentiary hearing" (*ibid.*).

In so holding, the Master recognized that the continuous movement of the gas from the Outer Continental Shelf across the state boundary and up to the processing plant is interstate commerce during the entire journey and that the tax would violate the Commerce Clause if its result is to impede interstate commerce (Report 32-33). He therefore rejected Louisiana's argument that the tax was levied on a local activity within the state.

Moreover, the Master agreed with the plaintiffs' contention that under the system of exclusions and credits provided by the First Use Tax, "Louisiana customers of local utilities and local consumers buying directly from

the pipelines are protected in whole or in part from the incidence of the tax which is passed on to consumers out of the State" (Report 34). But the Master nevertheless resisted the conclusion that the exclusions and credits unconstitutionally discriminated against the out-of-state consumer. While he acknowledged that such discrimination might be the case, the Master concluded that "it is hard to tell from the pleadings what adjustments can be made in the base prices, and what allowances can be made between buyers and sellers which might reduce or eliminate any disadvantage of one over the other" (Report 34-35).

Finally, the Special Master regarded the facts of this Court's decision in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954), to be "closest to this one" so that, under the rule of that case, many of the uses defined in the First Use Tax Act "would result in some of the acts being too intimately connected with interstate transmission to survive" (Report 36). But in light of the Louisiana statute's severability clause, the Master recommended that evidence should be heard as to the legal effect of the term "processing" in the statute to determine whether "processing" interrupts the interstate journey of the gas (Report 37).

INTRODUCTION AND SUMMARY

I.

"[I]t was settled even before the passage of the Natural Gas Act, that *direct* regulation of the prices of wholesales of natural gas in interstate commerce is beyond the constitutional power of the States—whether or not framed to achieve ends, such as conservation, ordinarily within the ambit of state power." *Northern Natural Gas Co.* v. *Kansas Commission*, 372 U.S. 84, 90 (1963) (emphasis in original). In passing the Natural Gas Act in 1938 and the Natural Gas Policy Act in 1978, Congress did something more. In the Court's words, "[t]he Congress enacted a comprehensive scheme of federal regulation of 'all

wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company[,]' *Phillips Petroleum Co.* v. *Wisconsin*, [347 U.S. 672,] 682 [1954] * * *" (372 U.S. at 91; footnote omitted).

The Louisiana First Use Tax conflicts with the federal regulation of the sale and transportation of natural gas in interstate commerce and is therefore invalid under the Supremacy Clause of the Constitution. Although couched in terms of a tax on the "use" of natural gas, the principal impact of the levy is to increase the price of gas extracted from federally-leased areas on the Outer Continental Shelf and from federal enclaves and shipped through Louisiana in interstate commerce. Since Congress by the Natural Gas Act and the Natural Gas Policy Act has vested in the Federal Energy Regulatory Commission the exclusive authority to set rates for the sale and transportation of such natural gas in interstate commerce, the Louisiana tax is incompatible with the federal regulatory scheme. It is therefore clear that the Louisiana tax trenches upon "matters which directly affect the ability of the [Commission] to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which [is] an objective of the Natural Gas Act [and the Natural Gas Policy Act]." *Northern Natural Gas Co.* v. *Kansas Commission, supra*, 372 U.S. at 91-92.

Contrary to the assertion of Louisiana, the decisions of this Court establish that the interstate journey of the gas subject to tax is not interrupted by the occurrence of any of the taxable "uses" enumerated in the Louisiana statute unless the gas is sold for ultimate consumption in Louisiana. Thus, whatever the extent of processing or treatment that occurs within Louisiana, it is settled that such processing does not break the interstate journey of gas that is produced outside of Louisiana and is brought into and/or through Louisiana for ultimate consumption in other states. The Master therefore erred in concluding

that evidence must be taken with respect to the legal effect of the processing of the gas.

Like the plaintiff States, we believe that the invalidity of the Louisiana tax under the Supremacy Clause can be demonstrated as a matter of law and that the Master erred in recommending against granting the plaintiffs' motion for judgment on the pleadings. It is undisputed that the principal impact of the Louisiana tax is on gas produced from fields located outside Louisiana on the Outer Continental Shelf and on federal enclaves. Moreover, the decisions of this Court further demonstrate that such gas moves in interstate commerce. Finally, it is clear that Louisiana has outlawed contractual provisions subject to regulation by the Federal Energy Regulatory Commission. Given Congress' intent to preempt the field and to grant exclusive regulatory authority over such gas to the Federal Energy Regulatory Commission, the incompatability of the Louisiana tax with that exclusive jurisdiction is established as a matter of law. The Louisiana tax is therefore invalid under the Supremacy Clause.

The Master's conclusion that evidentiary hearings are necessary in order to determine the degree of conflict between the Louisiana tax and the authority of the Federal Energy Regulatory Commission cannot be squared with the Supremacy Clause decisions of this Court. Where, as here, Congress determines to preempt the field of interstate gas regulation as to which the states never had any authority, any possible conflict between federal and state authority voids the state statute under the Supremacy Clause. As this Court aptly observed in *Northern Natural Gas Co.* v. *Kansas Commission, supra*, 372 U.S. at 92, "although collision between the state and federal regulation may not be an inevitable consequence, there lurks such imminent possibility of collision * * * that the [state] orders must be declared a nullity in order to assure the effectuation of the comprehensive federal regulation ordained by Congress."

II.

The pleadings also establish that the Louisiana First Use Tax is invalid under the Commerce Clause. The Commerce Clause flatly prohibits state taxation of goods that are merely in transit through the state when the tax is assessed. The Master acknowledged that the facts of *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954), are "closest to this one" (Report 36). We submit that *Michigan-Wisconsin Pipe Line Co.* controls this case. There, the Court struck down a similar state statute upon the entire volume of natural gas to be shipped in interstate commerce. The Court held it to be an unapportioned levy on the transportation of gas and therefore invalid under the Commerce Clause.

While the Louisiana tax is characterized as "upon the privilege of performance or allowing the performance by the owner, of the enumerated actions comprising first use within Louisiana" (La. Rev. Stat. Ann. § 47:1303 E (West Supp. 1980) (Mot. App. 6a), the provisions of the Act demonstrate that the tax falls on the transportation of the natural gas within Louisiana, not the privilege of use. Stripped to its essentials, the Louisiana levy is nothing more than an "unapportioned levy on the transportation of the entire volume of gas." *Wash. Rev. Dep't* v. *Stevedoring Ass'n*, 435 U.S. 734, 749 n.18 (1978). There is accordingly no need to conduct a factual inquiry into the nature of the processing of the gas, as the Master has recommended.

Even if the Louisiana First Use Tax is not simply a transit levy on gas moving in interstate commerce, it is nevertheless invalid because it is not fairly apportioned and because it discriminates against interstate commerce. It is not related to either the value of identifiable activities occurring within the taxing state, the taxpayer's investment in facilities within the state, its gross income from business or the percentage of business conducted within the state, or the length of the facilities or distance traveled within the state. The Master therefore erred in

concluding that the apportionment requirement is not applicable to this case.

The Louisiana tax also discriminates against interstate commerce in two distinct ways. First, while Louisiana has prohibited the purchasers of gas subject to the tax from shifting it to the producer, it does not prohibit purchasers of gas subject to its severance tax from shifting all or part of the tax to the producer. The practical effect of prohibiting the shifting of the First Use Tax is to impose a tax on Outer Continental Shelf and federal enclave gas which is greater than the tax imposed on gas produced within Louisiana.

Finally, the Louisiana First Use Tax discriminates against interstate commerce by requiring out-of-state consumers to bear the entire burden of the levy. This discrimination is accomplished by a system of credits designed to ensure that Louisiana consumers are relieved of any First Use Tax liability. The Louisiana tax therefore "falls short of the substantially even-handed treatment demanded by the Commerce Clause." *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 332 (1977).

ARGUMENT

I. THE PLAINTIFFS ARE ENTITLED TO JUDGMENT WITHOUT FURTHER EVIDENTIARY PROCEEDINGS BECAUSE THE PLEADINGS ESTABLISH THAT THE LOUISIANA FIRST USE TAX CONFLICTS WITH THE FEDERAL REGULATION OF THE SALE AND EXCLUSIVE TRANSPORTATION OF NATURAL GAS IN INTERSTATE COMMERCE AND IS THEREFORE INVALID UNDER THE SUPREMACY CLAUSE OF THE CONSTITUTION

A. The Gas Subject To The First Use Tax Moves In Interstate Commerce

As we have already explained (*supra*, page 7), the Louisiana First Use Tax applies to OCS gas and federal enclave gas. Gas in each of these categories moves in interstate commerce as that term is defined by the decisions of this Court.

It has long been established that natural "gas which crosses a state line at any stage of its movement from wellhead to ultimate consumption[,]" or gas which is commingled with gas so moving, is in interstate commerce during the entire journey. *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, 369 (1965).[14] That journey commences at the wellhead (*California* v. *Lo-Vaca Gathering Co., supra; East Ohio Gas Co.* v. *Tax Commission*, 283 U.S. 455 (1931)). It ends after the pressure is reduced and the gas is delivered into local distribution systems for ultimate consumption (*FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 472-473 (1950); *East Ohio Gas Co.* v. *Tax Commission, supra*, 283 U.S. at 470), or after the gas is delivered to an industrial user for consumption (15 U.S.C. 717(b)), or to a distribution company, or intrastate pipeline, which is subject to state or local regulation, at the border of, or within, a state and the gas is actually consumed within that state (15 U.S.C. 717(c)). This standard applies to the two categories of gas involved in this case.

a. *OCS gas.* OCS gas is produced from "field[s] * * * *located outside the borders of any state and any gas taken will have to be transported across state lines for sale* within the United States." *Continental Oil Co.* v. *FPC*, 370 F.2d 57, 66 (5th Cir. 1966) (emphasis in original), cert. denied, 388 U.S. 910 (1967). Thus, "the onshore movement of gas produced in the Federal domain offshore Louisiana constitutes interstate commerce within the meaning of the Natural Gas Act * * *." *Chandeleur Pipe Line Co.*, 42 F.P.C. 20, 25 (1969). See also *United*

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[14] See also *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 467, 469-472 (1950); *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682, 687-689 (1947); *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 503-506 (1942); *East Ohio Gas Co.* v. *Tax Commission of Ohio*, 283 U.S. 465, 470 (1931); *Peoples Natural Gas Co.* v. *Public Service Commission of Pennsylvania*, 270 U.S. 550, 554 (1926); *Public Service Commission of Kentucky* v. *FERC*, 610 F.2d 439, 444 (6th Cir. 1979); *Louisiana Public Service Commission* v. *FPC*, 359 F.2d 525, 527-528 (5th Cir. 1966); *Deep South Oil Co. of Texas* v. *FPC*, 247 F.2d 882, 887-889 (5th Cir. 1957), cert. denied, 355 U.S. 930 (1958).

Gas Pipe Line Co., 30 F.P.C. 560, 563-564 (1963). Furthermore, most of the OCS gas which enters Louisiana is transported through that state for ultimate consumption in other states.[15] This interstate movement is not interrupted by any of the taxable uses described in La. Rev. Stat. Ann. § 47:1302(8) (West Supp. 1980), unless the gas is sold to a local distribution company, intrastate pipeline, or user of gas within Louisiana, for ultimate consumption there.

b. *Federal enclave gas.* Federal enclave gas from Barksdale Air Force Base also moves in interstate commerce. That gas is processed near the field in plants owned by Union Texas Petroleum Company and Arkansas Louisiana Gas Company. The gas is then delivered to Arkansas Louisiana Gas Company, Mississippi River Transmission Corporation, Texas Gas Transmission Company, and United Gas Pipe Line Company. Some of this gas is sold to distribution companies and directly to industrial and other users in Louisiana; the remainder is transported to out-of-state consumers. The total volume of gas from Barksdale Air Force Base either moves in interstate commerce or is commingled with such gas. Thus, such federal enclave gas moves in interstate commerce from the time it leaves the wellhead until it is sold for ultimate consumption within Louisiana or other states.

B. The Taxable "Uses" Enumerated In The Louisiana Statute Do Not Interrupt The Journey Of The Gas In Interstate Commerce

1. Louisiana does not dispute the fact that each of the two categories of gas to which the First Use Tax applies—OCS gas and federal enclave gas—moves in in-

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[15] *Hearings on H.B. 768 Before the Committee on Ways and Means of the Louisiana House of Representatives* 7 (Rep. Tauzin) (June 5, 1978); *id.* at 9 (Mr. Brooksher) (June 6, 1978); *Hearings on H.B. 768 Before the Revenue and Fiscal Affairs Committee of the Louisiana Senate* 4 (Rep. Tauzin) (June 26, 1978).

terstate commerce. Moreover, the Master likewise agreed that the "natural gas is in interstate commerce during the entire journey" (Report 32). Louisiana contends, however, that extensive processing and treatment of the gas occurs in Louisiana and that these activities interrupt the journey of the gas in interstate commerce and thereby justify imposition of the tax (see Motion to Dismiss 22-26; Answer 11 ¶ XXXV, 13 ¶ XL). The Master concluded that evidentiary proceedings are necessary because "[t]here is an ongoing dispute between the parties as to the legal effect of the processing by which the hydrocarbons are extracted and its effect on the natural gas" (Report 28). See also Report 37.

But the decisions of this Court establish that the interstate journey of OCS and federal enclave natural gas is not interrupted by the occurrence of any of the taxable "uses" enumerated in the Louisiana tax statute unless the gas is sold for ultimate consumption in Louisiana. Thus, whatever the extent of processing or treatment that occurs within Louisiana, it is settled that such processing does not break the interstate journey of gas that is produced outside of Louisiana and is brought into and/or through Louisiana for ultimate consumption in other states. We turn now to a discussion of each of the taxable "uses" enumerated in the Louisiana First Use Tax Act.

a. The "sale" or "transfer of possession of relinquishment of control at a delivery point [within Louisiana]" (La. Rev. Stat. Ann. § 47:1302(8) (West Supp. 1980)) does not necessarily interrupt the interstate movement of gas subject to the First Use Tax. *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co., supra,* 314 U.S. at 503-504; *Peoples Natural Gas Co.* v. *Public Service Commission of Pennsylvania,* 270 U.S. 550, 554 (1926).

In transactions involving gas that is sold and/or delivered to another pipeline, which transports the gas, or commingles it with gas transported, out of Louisiana, or sells and/or delivers the gas to a third pipeline, which

transports the gas out of Louisiana, "the particular point at which the title and custody of the gas pass to the purchaser, without arresting its movement to its intended destination, does not affect the essential interstate nature of the business." *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co., supra,* 314 U.S. at 503-504.[16]

b. The "transportation in [Louisiana] to the point of delivery at the inlet of any processing plant" or "the transportation in [Louisiana] of unprocessed gas to the point of delivery at the inlet of any measurment or storage facility" (La. Rev. Stat. Ann. § 47:1302(8) (West Supp. 1980)) by an interstate pipeline does not interrupt the interstate movement of the gas. To the contrary, such transportation is an inseparable segment of the interstate movement of the gas from wellhead to the ultimate consumers located in Louisiana and in other states. Cf. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157, 163 (1954); *Area Rate Proceeding (Southern Louisiana Area),* 40 F.P.C. 530, 611 (1968), aff'd, 428 F.2d 407 (5th Cir.), cert. denied, 400 U.S. 950 (1970).

c. The storage of gas within Louisiana by an interstate pipeline, which may constitute "other ascertainable

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[16] On the other hand, if the gas is sold and delivered to an intrastate pipeline, or distribution company at the border of, or within, Louisiana, and is actually consumed within that state, it ceases to be in interstate commerce once that delivery is made. 15 U.S.C. 717(c); *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co., supra,* 314 U.S. at 503-504; *FPC* v. *East Ohio Gas Co., supra,* 338 U.S. at 472-473. The same is true if gas is sold and delivered to an industrial or other user within Louisiana. 15 U.S.C. 717(b); *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission,* 332 U.S. 507 (1947).

Gas which is subject to the First Use Tax and which is "use[d] in manufacturing" in Louisiana (§ 47:1302(8)) has ceased to be in interstate commerce with its delivery to the manufacturer, or the local distribution company or intrastate pipeline which serves that manufacturer. Moreover, the various credits and exclusions would minimize or eliminate any tax on this use. See Report 37 n.20.

action at a point within the state" (§ 47:1302(8)) does not interrupt the interstate movement if it is a temporary incident of such movement. Cf. *Board of Trade of City of Chicago* v. *Olsen*, 262 U.S. 1, 33-34 (1923).[17] This gas has moved in interstate commerce prior to storage and will so move upon withdrawal from storage in the manner previously authorized by the Commission until such time as the Commission, by an amendment to the certificate authorizing operation of the storage facility, authorizes a different movement. The seasonal storage of such gas does not break the interstate journey because the gas is stored to facilitate its movement to the ultimate consumers, whether in Louisiana or in other states, during the winter heating season when the demand for gas is the greatest.[18] Cf. *Champlin Realty Co.* v. *Brattleboro*, 260 U.S. 366, 376-377 (1962).

d. Finally, the delivery of gas to the operator of a treating and/or processing plant, treatment of the gas for removal of impurities and/or waste products, and processing to extract liquid and liquefiable hydrocarbons (see § 47:1302(8)) do not interrupt the interstate movement. Instead, as this Court has observed, the "[t]he entire movement of the gas, from the producing wells through the [processing plants] and into the [interstate] pipeline[s] to consumers outside [Louisiana] is a steady and continuous flow." *Michigan-Wisconsin Pipe Line Co.*

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[17] Storage of gas subject to the First Use Tax by an intrastate pipeline, local distribution company, or industrial or other consumer of gas within Louisiana presents a different legal issue. Such gas has ceased to be in interstate commerce by reason of the sale of such gas to those persons.

[18] See Federal Power Commission, *Natural Gas Survey*, Vol. I, at 39-40, 44-46, 47 (1975).

v. *Calvert*, 347 U.S. 157, 163 (1954); *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, 369 (1965); *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682, 685 n.7 (1947). *Public Service Commission of Kentucky* v. *FERC*, 610 F.2d 439, 444 (6th Cir. 1979). Thus, processing does not interrupt the continuous movement of the gas from the wellhead to consumer burner tips * * *." *Deep South Oil Co.* v. *FPC*, *supra*, 247 F.2d at 888.

C. The Louisiana Tax Interferes With The Federal Regulation Of The Transportation And Sale Of Natural Gas In Interstate Commerce

1. Once it is recognized that the First Use Tax is imposed upon OCS and federal enclave natural gas, and that these categories of gas move in interstate commerce, it can be readily seen that the Louisiana levy interferes with the federal regulation of the transportation and sale of gas in interstate commerce and is therefore invalid under the Supremacy Clause.[19]

We focus on § 47:1303 C of the First Use Tax as it interferes with the Commission's regulation of the transportation and sale of natural gas in interstate commerce. By the terms of the First Use Tax Act, § 4(2), 1978 La. Sess. Law Serv. 486, if that provision is unconstitutional, the entire statute becomes void.[20] Thus, if the Court agrees with our submission that the pleadings

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[19] "Although [these claims are] basically constitutional in nature, deriving [their] force from the operation of the Supremacy Clause, Art. VI, cl. 2, they are treated as 'statutory' for purposes * * * of deciding statutory claims first to avoid unnecessary constitutional adjudications." *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 271-272 & n.6 (1977); *Hagans* v. *Lavine*, 415 U.S. 528, 549 (1974).

[20] See *Hearings on H.B. 768 Before the Revenue and Fiscal Affairs Committee of the Louisiana Senate* 4, 13, 28 (Rep. Tauzin) (June 26, 1978).

show, without more, that § 47:1303 C is invalid under the Supremacy Clause, it need not reach any of the plaintiffs' other claims.[21]

Section 47:1303 C declares the First Use Tax to be "a cost associated with uses made by the owner in preparation of [*sic*] marketing of the natural gas." It abrogates "agreement[s] or contract[s] by which an owner of natural gas at the time a taxable use first occurs claims a right to reimbursement or refund of such taxes from any other party in interest, other than a purchaser of such natural gas * * * on the basis that this tax constitutes a cost incurred by such owner by virtue of the separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, or * * * any other grounds for reimbursement or refund * * *." Louisiana's answer states that "the sole purpose, intent, and application of [§ 47:1303 C is] to ensure that the First Use Tax will not unreasonably burden any person within the interstate commerce stream but will be passed along to the ultimate users and consumers." Answer 21 ¶ LX. The pleadings therefore show that § 47:1303 C seeks to regulate the apportionment of costs among producers, processors, and pipelines, and that it interferes with the Commission's exclusive jurisdiction.

2. Section 47:1303 C impinges upon the Commission's ratemaking authority under Sections 4 and 5 of the Natural Gas Act (15 U.S.C. 717c and 717d). Insofar as it characterizes the First Use Tax as a cost associated with

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[21] Contrary to Louisiana's denial (Answer 17-18 ¶ XLVIII), § 47:1303 C is a regulation of the transportation and sale of natural gas in interstate and foreign commerce. To " 'regulate' is to lay down the rule by which a thing shall be done." *FPC* v. *Corporation Commission of Oklahoma*, 362 F. Supp. 522, 532 (W.D. Okla. 1973) (three-judge court), aff'd per curiam, 415 U.S. 961 (1974). As it prescribes, "the rule by which natural gas produced [outside of Louisiana's taxing jurisdiction] may move from [Louisiana] to other states[,] [§ 47:1303 C] constitute[s], therefore, a regulation * * *" (362 F. Supp. at 533).

uses of the gas by the interstate pipeline owner and abrogates contractual provisions which would require persons other than gas consumers to bear the tax, § 47:1303 C interferes with the Commission's authority to allocate costs between gas consumers and the owners of liquid and liquefiable hydrocarbons which aer carried by interstate pipelines.

Because many natural gas pipelines transport extractable hydrocarbons as well as natural gas, the Commission must determine which costs should be borne by natural gas consumers and which should be borne by the owners of the extractable hydrocarbons.[22] The First Use

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[22] *Mobil Oil Corp.* v. *FPC*, 483 F.2d 1238, 1241-1243, 1247, 1249 (D.C. Cir. 1973); *City of Detroit* v. *FPC*, 230 F.2d 810, 819-821 (D.C. Cir. 1955), cert. denied, 352 U.S. 829 (1956); *Cities Service Gas Co.* v. *FPC*, 155 F.2d 694, 703 (10th Cir.), cert. denied, 329 U.S. 773 (1946); *Hope Natural Gas Co.* v. *FPC*, 134 F.2d 287, 307-308 (4th Cir. 1943), rev'd on other grounds, 320 U.S. 591 (1944); *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635, 641-642 (1945); *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 588-590 (1945).

When these cases were decided, the Commission could not directly prescribe rates for the transportation of liquid hydrocarbons; it could only assign costs to that service and preclude the recovery of such costs in rates charged natural gas consumers. *Mobil Oil Corp.* v. *FPC*, *supra*, 483 F.2d at 1246-1249. Arguably, the Commission could regulate the terms on, and rates at, which liquefiable hydrocarbons—those hydrocarbons produced with natural gas existing in a gaseous state when produced and transported that may be extracted from the gas stream by processing, liquefied, and treated as liquids (*id.* at 1241)—are transported in interstate commerce pursuant to the Natural Gas Act (*id.* at 1242, 1246, 1249). The Commission's authority to regulate the transportation of liquid and liquefiable hydrocarbons by interstate natural gas pipelines (cf. *id.* at 1242-1243), was established when the Department of Energy Organization Act ("DOE Act") vested the Commission with jurisdiction to set rates for the transportation of oil by common-carrier pipeline (DOE Act, Section 402(b), 42 U.S.C. (Supp. II) 7172(b)), including any "petroleum by-products, derivatives or petrochemicals." H.R. Rep. No. 95-539, 95th Cong., 1st Sess. 69 (1977). Thus, the Commission may now prescribe directly the rates for the transportation of liquid and liquefiable hydrocarbons by natural gas pipelines providing common carriage for such prod-

Tax, like other taxes and costs, is an element of the pipeline's cost of service. *FPC* v. *United Gas Pipe Line Co.*, 386 U.S. 237, 243 (1967). It is for the Commission and the Commission alone to determine whether this cost should be borne by gas consumers or others. *Id.* at 243-246.

The Commission has consistently held that a pipeline's natural gas customers do not receive any benefits from the pipeline's transportation of liquid and liquefiable hydrocarbons for the owners, and that the costs associated with the transportation and delivery of those products at the inlet of a processing plant must be borne by the producers, who benefit from such activities, and not by natural gas consumers.[23] The Commission has also held that costs associated with the processing of natural gas to extract the liquid and liquefiable hydrocarbons must be borne by the owners of the products, and not by the natural gas consumers.[24]

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ucts. Accordingly, since any natural gas pipeline operating on the Outer Continental Shelf, which carries liquid and liquefiable hydrocarbons for producers, must operate as a common carrier (43 U.S.C. 1334(c)), the Commission may now prescribe directly the rates for the transportation by pipeline of liquid hydrocarbons as well as for the liquefiable hydrocarbons and natural gas carried by such pipelines.

[23] *Union Oil Company of California*, Docket Nos. C177-828, *et al.*, order at 7, 10-11 (Apr. 12, 1978); *Canadian Superior Oil (U.S.) Ltd.*, Docket No. C177-802 (Mar. 28, 1978); *High Island Offshore System*, Docket Nos. CP75-104, *et al.*, order at 10, 16-17, 18 (June 4, 1976); *Tennessee Gas Pipeline Co.*, 38 F.P.C. 691, 698 (1967); *Northern Natural Gas Co.*, 28 F.P.C. 1155, 1163-1165 (1962); aff'd *sub nom. Mid-American Pipeline Co.* v. *FPC*, 330 F.2d 226 (D.C. Cir. 1964); *Continental Oil Co.*, 27 F.P.C. 96, 107-108 (1962); *Texas Eastern Transmission Corporation*, 11 F.P.C. 435, 447 (1952). See also *Pipeline Costs Allocable to the Transportation of Liquids, Liquefiable Hydrocarbons, etc., For Others*, 47 F.P.C. 208 (1972), rev'd on other grounds *sub nom. Mobil Oil Corp.* v. *FPC*, 483 F.2d 1238 (D.C. Cir. 1973).

[24] Natural gas is processed to extract liquid and liquefiable hydrocarbons because those products are considered more valuable than the processed gas. *E.g., Deep South Oil Co. of Texas* v. *FPC, supra*, 247 F.2d at 888; *National Rates for Natural Gas*, 54 F.P.C. 3090,

The First Use Tax is such a cost. It is imposed on activities which, in most cases, occur solely because the pipeline transports and delivers the gas stream to a processing plant so that the producers may separate and extract the liquid and liquefiable hydrocarbons contained in that stream. Thus, "the transportation in [Louisiana]

3096-3102 (1975), reh. denied, 15 P.U.R. 4th 1, 12-13 (1976), aff'd in part and rev'd in part on other grounds *sub nom. Tenneco Oil Co.* v. *FERC*, 571 F.2d 834, 844-845 (5th Cir. 1978). The removal of these hydrocarbon products does not benefit gas consumers because it reduces both the volume, and heat content, of the processed gas. *Area Rate Proceeding (Southern Louisiana Area)*, 40 F.P.C. 530, 611 (1968), aff'd, 428 F.2d 407 (5th Cir.), cert. denied, 400 U.S. 950 (1970); *Northern Natural Gas Co.*, 28 F.P.C. 1155, 1158, 1163-1165 (1962), aff'd *sub nom. Mid-American Pipe Line Co.* v. *FPC*, 330 F.2d 226 (D.C. Cir. 1964).

Although the methodologies have differed, the Commission has applied the policy of requiring the owner of hydrocarbons to bear the cost of their extraction in establishing rates for producers as well as for pipelines. In establishing producer rates, the Commission had either credited revenues from the sale of the extracted hydrocarbons against costs, or allocated costs between the processed gas and the extracted hydrocarbons on the basis of economic and physical characteristics of the two products. *National Rates For Natural Gas*, Docket No. RM75-14, Opinion No. 770, 15 P.U.R. 4th 21, 49-50 (1976), reh. denied, Opinion No. 770-A, 17 P.U.R. 4th 317, 346-347 (1976), aff'd *sub nom. American Public Gas Association* v. *FPC*, 567 F.2d 1016 (D.C. Cir. 1977), cert. denied, 435 U.S. 907 (1978); *National Rates for Natural Gas*, 54 F.P.C. 3090, 3096-3102 (1975), reh. denied, 15 P.U.R. 4th 1, 12-14 (1976). In establishing rates for those pipelines, which own the extracted hydrocarbons as well as the processed gas, the Commission has credited the revenues from the sales of the liquids against the pipeline's cost of service. *Kansas-Nebraska Natural Gas Company*, 53 F.P.C. 1691, 1702-1703 (1975), reh. denied, 54 F.P.C. 923 (1975); *Panhandle Eastern Pipe Line Co.*, 25 F.P.C. 787, 797-798 (1961), remanded *sub nom. Panhandle Eastern Pipe Line Co.* v. *FPC*, 305 F.2d 763, 767-768 (D.C. Cir. 1962), cert. denied, 372 U.S. 916 (1963), aff'd on remand, 32 F.P.C. 636 (1964), aff'd per curiam, 348 F.2d 340 (D.C. Cir.), cert. denied, 382 U.S. 944 (1965); *Northern Natural Gas Co.*, 28 F.P.C. 1155, 1163-1165 (1962), aff'd *sub nom. Mid-American Pipeline Co.* v. *FPC*, 330 F.2d 226 (D.C. Cir. 1964); *Tennessee Gas Transmission Co.*, 18 F.P.C. 428, 435 (1957); *id.* at 474-479 (Initial Decision).

of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility[,] * * * processing for the extraction of liquefiable component products or waste material[,] * * * [and] treatment" [25] occur solely because the gas is delivered to a producer-owned processing plant. Moreover, the pipeline must "transfer * * * possession or relinquish[] control at a delivery point in [Louisiana]" (§ 47:1302(8)) at the inlet of the processing plant to enable the producers to process the gas. Since such activities benefit only the producers, the Commission must determine whether the producers or the pipelines' natural gas customers must bear the costs (including any taxes) incurred by the pipelines because of these activities.

Section 47:1303 C, however, seeks to preclude the Commission from classifying the First Use Tax as a cost associated with the extraction of hydrocarbons and requiring that it be recovered from those products. It does this by abrogating contracts which require the owners of the extracted hydrocarbons to reimburse the transporting interstate pipelines for costs allocated to transporting and processing of those products. This abrogation prohibits the interstate pipeline from obtaining reimbursement from the owner of the extracted hydrocarbons and requires the interstate pipeline to seek reimbursement, if at all, from subsequent purchasers of the processed gas. The practical effect of this provision is to shift the incidence of significant costs incurred primarily for the benefit of the owners of the extracted hydrocarbons to the ultimate consumer of the processed gas without the prior approval of the Commission.

D. No Evidentiary Proceedings Are Necessary To Establish The Invalidity Of The First Use Tax Under The Supremacy Clause

1. In his Report, the Master acknowledged that Congress has vested in the Federal Energy Regulatory Commission the exclusive authority to regulate the sale and

[25] La. Rev. Stat. Ann. § 47:1302(8) (West Supp. 1980).

transportation of natural gas in interstate commerce and that "the impact of the tax appears to be directed at interstate sales by reason of the exemptions and credits granted intrastate users" (Report 27). Despite the conceded conflict between the Louisiana tax and the federal regulatory scheme, the Master nevertheless concluded that "a decision [on the Supremacy Clause] is hard to make on the pleadings since it is difficult to calculate how great an effect on the regulatory power of the FERC is imposed" (*ibid.*). As the Master saw the matter, "[t]he issue eventually to be resolved is whether the first use tax is just one of the many factors affecting the price, some of which are beyond the FERC control, or whether it is a substantial hindrance to the Commission's powers" (*ibid.*). In so ruling, the Master observed that "it may be that in the end FERC's orders can be adjusted so that the laws will mesh without conflict" (Report 29).

But the Master's conclusion that further inquiry is required to determine the degree of conflict between the Louisiana tax and the authority of the Commission cannot be squared with the decisions of this Court interpreting the Supremacy Clause. The Master's point might be well taken if this were a case where Congress has legislated in an area which the States have traditionally occupied. In those circumstances, the Court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978), and cases cited therein. In such a case, the state statute is void to the extent that it actually conflicts with a valid federal statute, *i.e.*, "where compliance with both federal and state regulations is a physical impossibility * * *" (*Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963)), or where the state "law stands as an obstacle to the ac-

complishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

This is not a case in which actual conflict between federal and state authority must be proved to establish a violation of the Supremacy Clause. Here, the federal regulation scheme is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice* v. *Santa Fe Elevator Corp.*, *supra*, 331 U.S. at 230. Indeed, it is beyond question that the states have not traditionally occupied the field of regulation of interstate sales of gas. As we have pointed out (*supra*, page 11), "it was settled even before the passage of the Natural Gas Act, that *direct* regulation of the prices of wholesales of natural gas in interstate commerce is beyond the constitutional power of the States—whether or not framed to achieve ends, such as conservation, ordinarily within the ambit of state power." *Northern Natural Gas Co.* v. *Kansas Commission*, *supra*, 372 U.S. at 90 (emphasis in original). Accord: *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927); *Missouri* v. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923); *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911). Thus, in passing the Natural Gas Act in 1938, Congress intended to "touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws of the same subject." *Rice* v. *Santa Fe Elevator Corp.*, *supra*, 331 U.S. at 230. See also *Ray* v. *Atlantic Richfield Co.*, *supra*, 435 U.S. at 157-158, and cases cited therein. Accordingly, Congress did not intend to complement existing state regulation but to establish an exclusive federal authority that would preempt all forms of state regulation not expressly authorized.[26]

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[26] *Portland Pipe Line Corp.* v. *Environmental Improvement Commission*, 307 A.2d 1 (Me. 1973), which the Master cited as "[t]he case which most strongly supports Louisiana's position" (Report 30), has no bearing on the Supremacy Clause issue. There, the Supreme Court of Maine upheld a Maine tax levied upon the move-

In these circumstances, there is no need for a factual inquiry to determine the degree of interference between the Louisiana tax and the authority of the Commission. Given Congress' intent to preempt the field, Louisiana cannot enact laws that "conflict, or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Hines* v. *Davidowitz*, *supra*, 312 U.S. at 66-67; *Jones* v. *Rath Packing Co.*, *supra*, 430 U.S. at 525; *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959); *Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 138-139 (1976). Accordingly, any possible interference between the First Use Tax and the authority of FERC voids the state statute. As the Court stated in the closely analogous situation in *Northern Natural Gas Co.* v. *Kansas Commission*, *supra*, 372 U.S. at 92, "although collision between the state and federal regulation may not be an inevitable consequence, there lurks such imminent possibility of collision * * * that the orders must be declared a nullity to assure the effectuation of the comprehensive federal regulation ordained by Congress."

Here, the Louisiana tax indisputably adds a cost to the price of gas sold in interstate commerce and requires that such cost be absorbed by the pipeline or passed on

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ment of oil in the state harbor waters in order to provide funds to clean up oil spills. But the court did not consider whether the tax violated the Supremacy Clause. Rather, it addressed claims raised under the Due Process, Commerce, Import-Export, Tonnage, and Admiralty Clauses.

Moreover, the Master's suggestion (*ibid.*) that a question could have been raised in that case about the supremacy of the Water Quality Improvement Act of 1970, 33 U.S.C. 1321, is not well taken. As the Maine court correctly observed (307 A.2d at 40), there was no conflict between federal and state law. Congress declared in that statute that "it did not intend to preempt the field." See also 33 U.S.C. 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution * * *"). Here, on the other hand, Congress did preempt the field of interstate natural gas regulation.

to the ultimate consumer. Congress has decreed that it is for the Commission—and not Louisiana—to make such a judgment. The Commission is not required to accommodate its orders to the Louisiana tax.[27] Hence, the First Use Tax violates the Supremacy Clause; no amount of evidence that Louisiana may submit can save the tax from a judgment of invalidity.

Indeed, the Court's decision in *Northern Natural Gas Co.* v. *Kansas Commission, supra,* underscores our point with particular force. There, this Court held that the orders of the Kansas Commission—requiring an interstate pipeline to purchase ratably from all wells connected to its pipelines system within the state—imper-

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[27] Hence, the Master erred in relying (Report 27) upon the fact "that the FERC has permitted, over its strong disinclination to do so, the first use tax to be treated as a cost of transportation and of processing and therefore included as one of the underlying factors on which the price to consumers is fixed."

To begin with, the Master has misapprehended the purpose and nature of the Commission's action. The Commission does not consider the First Use Tax to be a cost which should be passed along to consumers. *State of Louisiana First Use Tax in Pipeline Rate Cases,* Order No. 10, 43 Fed. Reg. 45553 (1978); Order No. 10-A, 43 Fed. Reg. 60438 (1978); Order No. 10-B, 44 Fed. Reg. 13460, 13461-13462 & nn.16, 19, 20 (1979); Order No. 10-C, 45 Fed. Reg. 29011, 29012, 29014 (1980), petitions for review pending *sub nom. Tennessee Gas Pipeline Company* v. *FERC,* No. 78-3816 (5th Cir.). The Commission has allowed the pipelines to collect the tax subject to refund while the constitutionality of the First Use Tax is litigated only because the courts have held that, where a utility is required to pay a tax and sue for a refund, it is entitled to collect the tax subject to refund while the tax refund suit is pending. See *Tennessee Natural Gas Lines, Inc.* v. *FPC,* 221 F.2d 531 (D.C. Cir. 1954); accord: *City of Cleveland* v. *FPC,* 525 F.2d 845, 850 n.37 (D.C. Cir. 1976).

At all events, even on the assumption that the Commission has adjusted, albeit provisionally, to the economic reality imposed by the tax, the fact of the Commission proceeding has no bearing on the resolution of the Supremacy Clause issue. Since Congress has preempted the field of the regulation of the interstate sale of natural gas, the critical question is not whether the Commission can accommodate itself to the Louisiana tax but whether the tax impinges upon the Commission's authority.

missibly encroached upon the Commission's exclusive regulatory domain (372 U.S. at 91-92, 97-98), because they "necessarily deal with matters which directly affect the ability of the Federal [Energy Regulatory] Commission to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act" (*id.* at 91-92). The Court found that the State order to purchasers to take ratably "could seriously impair the * * * Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States[,] * * * a matter with respect to which Congress has given the [Commission] paramount and exclusive authority" (*id.* at 92). The Court then held that, since "Congress [had] so plainly occupied the regulatory field," the state regulation must be subordinated to federal regulation to avoid jeopardizing the objective of uniformity (*id.* at 93, 98).

Like the orders of the Kansas Commission, § 47:1303 C of the Louisiana statute seeks to regulate the costs to be borne by interstate pipelines. Section 47:1303 C requires that when an interstate pipeline pays the First Use Tax, the pipeline must recover the tax, if at all, from subsequent purchasers of the gas and may not pass the burden of tax back to the producers. Section 47:1303 C thus seeks to determine the apportionment of costs between producers, pipelines, and consumers. But regulation of this very type of apportionment is a matter over which Congress has given the Commission paramount and exclusive authority. Sections 4, 5 and 7 of the Natural Gas Act of 1938, 15 U.S.C. 717c, 717d and 717f; Section 110 of the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. II) 3320. "The federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas * * * or for state regulations which would indirectly achieve the same result." *Northern Natural Gas Co.* v. *Kansas Commission, supra,* 372 U.S. at 91.

2. Nor is there any need to hold evidentiary hearings on the legal effect of § 47:1303 C of the Louisiana statute that prohibits contracts that pass the tax back to producers but permit it to be added to the purchase price of the consumers. In addressing this provision, the Master acknowledged (Report 28) that "FERC had previously accepted contracts that provided that the processing involved and the tax on it were properly considered costs of producing liquid and liquefiable hydrocarbons, not properly to be borne by consumers of the natural gas." Despite the conflict between the Louisiana tax that outlaws contracts and the exclusive authority of the Commission to which such contracts are subject, the Master concluded that "[t]here is an ongoing dispute between the parties as to the legal effect of the processing by which the hydrocarbons are extracted and its effect on the natural gas" (*ibid.*). The Master concluded that the Commission's position would be sound only if the gas emerges from the processing plant in essentially the same state and that evidence should be taken on this point.

But in so ruling, the Master has overlooked the critical fact that the allocation of costs among producers, pipelines, and consumers of natural gas is a judgment for the Commission, and the Commission alone, to make. The Commission has the exclusive authority to make that determination. The fact that Louisiana has outlawed contracts that require the producers to bear the tax where such contracts are subject to the exclusive regulation of the Commission necessarily voids the Louisiana levy under the Supremacy Clause.

There is accordingly no need to take evidence on the nature of the processing of the gas. Even if the processing involves the chemical transformation of "wet gas" into "dry gas" and other products, as Louisiana contends (Report 29),[28] the Commission still has the exclusive

[28] Louisiana's description of the nature and purpose of processing (Motion to Dismiss and Brief in Support of Motion to Dismiss and in Opposition to Motion for Judgment on the Pleadings 24-26; Brief in Response to Brief for the United States and the

authority to determine whether the tax may be passed on to consumers or back to the producers.

In light of the foregoing, it is clear that § 47:1303 C trenches upon "matters which directly affect the ability of the [Commission] to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which [is] an objective of the Natural Gas Act [and the Natural Gas Policy Act]." *Northern Natural Gas Co.* v. *Kansas Commission, supra*, 372 U.S. at 91-92. By providing that the First Use Tax can only be passed on only to natural gas consumers, § 47:1303 C "seriously impair[s] the [Commission's] authority to regulate the intricate relationship between the [pipeline] purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other states" (372 U.S. at 92).

Federal Energy Regulatory Commission as Amici Curiae 33 & n.8) is at odds with the definition of processing in the First Use Tax (La. Rev. Stat. Ann. § 47:1302(3) (West Supp. 1980)). There, the Act defines "processing" as

> the scrubbing of a natural gas stream by specifically applied mechanical processes of absorption, compression, cooling, cryogenics, refrigeration or any combination thereof for the purpose of extracting natural or casinghead gasoline, methane, ethane, propane, butane and other liquefiable hydrocarbons[.]

It is also at odds with the description of natural gas production, transportaiton to processing plants, and processing found in *Mobil Oil Corp.* v. *FPC*, 483 F.2d 1238, 1241 (D.C. Cir. 1973) (transportation to processing plants); *Freeland* v. *Sun Oil Co.*, 184 F. Supp. 754, 756, 758-759 (W.D. La. 1959), aff'd, 277 F.2d 154 (5th Cir.), cert. denied, 364 U.S. 826 (1960) (processing); *Continental Oil Co.*, 27 F.P.C. 96, 149-150 (1962) (Initial Decision) (movement of gas from offshore platform through a processing plant); *Deep South Oil Company of Texas*, 14 F.P.C. 308, 313 (1955) (processing), aff'd, 247 F.2d 882 (5th Cir. 1957), and *Phillips Petroleum Co.*, 10 F.P.C. 246, 255-261 (1950) (processing), rev'd on other grounds, 347 U.S. 672 (1954).

In practical effect, Louisiana seeks to resurrect the long-discredited distinction between "wet gas" and "dry gas." See, *e.g.*, *Deep South Oil Company of Texas* v. *FPC, supra*. Moreover, Louisiana's position is contrary to the well-established exclusive jurisdiction of the Commission to allocate costs incurred prior to the completion of processing.

Since regulation of "[t]his relationship is a matter with respect to which Congress has given the [Commission] paramount and exclusive authority[,]" § 47:1303 C should be "declared a nullity in order to assure the effectuation of the [regulatory scheme] ordained by Congress" (372 U.S. at 92).

II. THE PLEADINGS ESTABLISH THAT THE LOUISIANA FIRST USE TAX IS INVALID UNDER THE COMMERCE CLAUSE

A. The Louisiana Tax Is A Transit Levy On Gas Moving In Interstate Commerce

1. Article I, Section 8, Clause 3 of the Constitution provides that: "Congress shall have power * * * to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." As the Court observed in *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944), "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States." It is settled by the decisions of this Court that "the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. * * * [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946). See also *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 328 (1977).

The Commerce Clause flatly prohibits state taxation of goods that are merely in transit through the state when the tax is assessed. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954); *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 290 n.11 (1976). Moreover, to the extent the goods come to rest and the tax can be said to reach a local activity, it is valid only where it is applied to activities having a substantial nexus with the state, is fairly apportioned, does not discriminate against inter-

state commerce, and is fairly related to the services provided by the state. See, *e.g.*, *Wash. Rev. Dep't* v. *Stevedoring Ass'n*, 435 U.S. 734, 750 (1978); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977).

2.a. The First Use Tax is imposed upon gas that is in transit through Louisiana in interstate commerce. While the tax is characterized as "upon the privilege of performance or allowing the performance by the owner, of the enumerated actions comprising first use within [Louisiana]" (La. Rev. Stat. Ann. § 47:1303 E (West Supp. 1980) (Mot. App. 6a), provisions of the Act demonstrate that the tax falls on the transportation of the natural gas within Louisiana, not the privilege of use.[29]

As we have pointed out (pages 4-5, *supra*), "[t]he tax imposed * * * shall be computed at a rate of seven cents on each unit of natural gas as to which a use first occurs within [Louisiana]" and the term "unit" is defined as "one thousand cubic feet of natural gas" measured at a specified pressure and temperature. La. Rev. Stat. Ann. § 47:1303 B (West Supp. 1980) (Mot. App. 5a). But such a levy is no different than a tax imposed "at the rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered" at the outlet of a processing plant that this Court struck down in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, *supra*, 347 U.S. at 161. There, Texas levied a tax on the production of natural gas measured by the entire volume of gas to be shipped in interstate commerce. A refinery extracted the gas from crude oil and transported it 300 yards to the pipeline. Like Louisiana, the State identified, as a local

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[29] "Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted." *Carpenter* v. *Shaw*, 280 U.S. 363, 367-368 (1930). See also *Society for Savings* v. *Bowers*, 349 U.S. 143, 150 (1955); *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 280 (1932).

incident, the transfer of gas from the refinery to the pipeline. The Court held the tax to be unconstitutional under the Commerce Clause because it was an unapportioned levy on the transportation of the entire volume of gas. The extraction did not relate to the length of the Texas portion of the pipeline or the percentage of the taxpayer's business that was attributable to Texas. In these circumstances, the Court ruled that the Texas tax could not survive attack under the Commerce Clause.

In our view, *Michigan-Wisconsin Pipe Line Co.* controls the Commerce Clause aspects of this case. Stripped to its essentials, the Louisiana tax is simply a transit fee on the privilege of moving gas through the state. It is unrelated to the actual consumption of the gas within the state. Indeed, to the extent that gas subject to tax comes to rest and is consumed within the state, there are credits that are available to offset other Louisiana taxes payable by the users. Nor does the tax bear any reasonable relationship to the transporter's business within Louisiana. It is nothing more than an "unapportioned levy on the transportation of the entire volume of gas" (*Wash. Rev. Dep't* v. *Stevedoring Ass'n, supra,* 435 U.S. at 749 n.18) and is therefore invalid under the Commerce Clause.

b. The Master acknowledged the force of our contention under *Michigan-Wisconsin Pipe Line Co.*, by observing that it is "the case which on its facts is closest to this one" (Report 36). He further conceded that "[a]pplying the *Michigan-Wisconsin Pipe Line Co.* case to Louisiana's uses as defined in the act would result in some of the acts being too intimately connected with interstate transmission to survive" (*ibid.*). However, the Master resisted the conclusion that the tax was invalid under the Commerce Clause because "[t]here is a very real dispute among the parties as to the legal effect of the 'processing' use" (Report 37).

But the Master's reservations with respect to the "processing" use cannot be squared with the well settled authorities (which he apparently accepted—see Report 31-

32) holding that "processing does not interrupt the continuous movement of the gas from the wellhead to consumer burner tips and is merely a part of the business of transporting and marketing gas in interstate commerce" (*Deep South Oil Company of Texas* v. *FPC*, *supra*, 247 F.2d at 888; accord, *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, *supra*, 347 U.S. at 163; *Interstate Natural Gas Co.* v. *FPC*, *supra*, 331 U.S. at 685 n.7; *Public Service Commission of Kentucky* v. *FERC*, *supra*, 610 F.2d at 444), and that "gas which crosses a state line at any stage of its movement from wellhead to ultimate consumption [is] 'in interstate commerce' within the meaning of the [Natural Gas] Act." *California* v. *Lo-Vaca Gathering Co.*, *supra*, 379 U.S. at 369. There is accordingly no basis for the Master's suggestion that "processing" may be local activity subject to state tax.

B. The Louisiana Tax Is Not Fairly Apportioned And Discriminates Against Interstate Commerce

1. A tax on interstate activities is properly apportioned if it is related to the value of identifiable activities occurring within the taxing state (*Wash. Rev. Dep't* v. *Stevedoring Ass'n*, *supra*, 435 U.S. at 746-747), the taxpayer's investment in facilities within the state (*Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100, 107 n.5 (1975); *Memphis Natural Gas Co.* v. *Stone*, 335 U.S. 80, 81-82 nn.1 & 2, 93 (1948) (Opinion of Reed, J.)), gross income from business conducted within the state (*Wash. Rev. Dep't* v. *Stevedoring Ass'n*, *supra*, 435 U.S. at 737-738 & n.4, 750; *Complete Auto Transit, Inc.* v. *Brady*, *supra*, 430 U.S. at 275), the percentage of the taxpayer's business in the state (*Wash. Rev. Dep't* v. *Stevedoring Ass'n*, *supra*, 435 U.S. at 749 n.18; *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 273, 278 (1872)), or the length of the facilities or distance traveled within the state (*Norfolk & W. Ry.* v. *Tax Comm'n*, 390 U.S. 317, 323-325 (1968)).

The First Use Tax is not related to any of these factors. Rather, it is imposed on the entire volume of OCS

and federal enclave gas entering the state, except such gas as is consumed in certain uses with Louisiana. La. Rev. Stat. Ann. §§ 47:1303 A, B (West Supp. 1980) (Mot. App. 4a-5a). The tax "is the same whether the [gas is] moved one mile or three hundred." *Case of the State Freight Tax*, *supra*, 82 U.S. (15 Wall.) at 273. It is therefore simply "an unapportioned levy on the transportation of the entire volume of gas." *Wash. Rev. Dep't* v. *Stevedoring Ass'n*, *supra*, 435 U.S. at 749 n.18.

Contrary to Louisiana's contention (Answer 10 ¶ XXXIV, 12 ¶XXXVII), and the Master's observations (Report 35-36), the tax is not apportioned simply because it applies only if the gas is subjected to one of the enumerated uses. The Louisiana taxable "uses," like the taking of gas by a pipeline at the outlet of a processing plant, are inseparable elements of the interstate transmission of gas. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, *supra*. As the Court there stated, in terms that are strikingly appropriate to this case, there are "aspect[s] of interstate transportation [which] cannot be 'carve[d] out from what is an entire or integral economic process,' * * * by legislative whimsy and segregated as a basis for [a] tax" (347 U.S. at 169, quoting *Nippert* v. *Richmond*, 327 U.S. 416, 423 (1946)). The Master therefore erred in concluding (Report 36) that "[i]t does not seem * * * that the apportionment requirement has any application here."

2. One of the unquestioned principles in this Court's Commerce Clause jurisprudence is that no state, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce * * * by providing a direct commercial advantage to local business" (*Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 457 (1959)). See also *Halliburton Oil Well Co.* v. *Reily*, 373 U.S. 64 (1963); *Nippert* v. *Richmond*, 327 U.S. 416 (1946); *I. M. Darnell & Son* v. *Memphis*, 208 U.S. 113 (1908); *Guy* v. *Baltimore*, 100 U.S. 434, 443 (1880); *Welton* v. *Missouri*, 91 U.S. 275 (1876). "The prohibition against discriminatory treat-

ment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects." *Boston Stock Exchange* v. *State Tax Comm'n, supra,* 429 U.S. at 329, quoting from *Dean Milk Co.* v. *Madison,* 340 U.S. 349, 356 (1951). The First Use Tax discriminates against interstate commerce in two distinctive ways.

a. First, Louisiana has prohibited the purchasers of gas subject to the First Use Tax from shifting any or all of that tax to the producer. La. Rev. Stat. Ann. § 47:1303 C (West Supp. 1980) abrogates provisions of contracts that require persons other than purchasers of such gas to pay the First Use Tax. On the other hand, Louisiana does not prohibit purchasers of gas subject to its severance tax from shifting all or part of the tax to the producer. To the contrary, Louisiana permits the purchasers and sellers of such gas to determine, by contract, who shall bear that tax. La. Rev. Stat. Ann. § 47:633.1 (West Supp. 1980).

The practical effect of prohibiting the shifting of the First Use Tax while allowing the shifting of the severance tax is to impose a tax on OCS and federal enclave gas which is greater than the tax imposed on gas produced within Louisiana. As matters now stand, purchasers of gas produced in Louisiana, and sold in either interstate or intrastate commerce, can seek the advantage of the lower tax burden that is denied to interstate purchasers of the gas subject to the First Use Tax. There is no constitutional warrant for such discriminatory treatment. *Boston Stock Exchange* v. *State Tax Comm'n, supra,* 429 U.S. at 333-336. "The conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated taxpayers is the condition precedent for a valid use tax on goods imported from out-of-state." *Halliburton Oil Well Co.* v. *Reily, supra,* 373 U.S. at 70.

b. The Louisiana First Use Tax also discriminates against Interstate commerce by requiring out-of-state consumers to bear the entire burden of the levy. This discrimination is accomplished by a system of exemptions and credits designed to ensure that Louisiana consumers are relieved of First Use Tax liability.

La. Rev. Stat. Ann. § 47:1303 A (West Supp. 1980) (Mot. App. 4a-5a),[30] provides that the First Use Tax shall not be levied against natural gas, otherwise subject to the tax, which is consumed in specified uses within Louisiana. However, natural gas subject to the tax which is consumed in identical uses in other states is not granted a similar exemption. So, also, the related Severance Tax Credit[31] permits taxpayers liable for the First Use Tax to credit that liability, dollar-for-dollar, against their liability for Louisiana's severance tax. As a result of this credit, Louisiana imposes a higher tax on those persons who do not pay Louisiana severance taxes than it does on those who do.[32] Thus, Louisiana businesses enjoy a distinct commercial advantage over their out-of-state competitors in the form of lower prices for natural gas.

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[30] The First Use Tax does "not apply to natural gas otherwise subject [to the tax] * * * used or consumed in the drilling for or production of oil, natural gas, sulphur, or in the processing of natural gas for liquids extraction within the state; nor * * * to gas shrinkage volumes attributable to the extraction of ethane, propane, butanes natural or casinghead gasoline or other liquefied hydrocarbons * * *[,] nor * * * to natural gas used or consumed in the manufacture of fertilizer and anhydrous ammonia within the state." § 47:1303 A.

[31] First Use Tax On Natural Gas—Severance Tax Credit, Act No. 436, 1978 La. Sess. Law Serv. 842 (West), La. Rev. Stat. Ann. § 47:647 (West Supp. 1980).

[32] This difference can be illustrated by the following example. Owner A has 1000 Mcf of OCS gas; Owner B has 500 Mcf of OCS gas and 500 Mcf of gas subject to Louisiana's severance tax. A owes $70 of first use tax; B owes $35 of first use tax and $35 in severance tax. B, however, pays only $35 in first use taxes. He owes no severance tax because he can credit the first use tax payment against his severance tax liability (see Report 34 n.18).

c. Finally, Act No. 599 [33] allows every Louisiana electric generating plant, gas distribution service, and direct purchaser of natural gas from an interstate pipeline, to recoup that portion of increased rates it pays for natural gas which is attributable to increased transportation and marketing costs for natural gas from the federal domain of the Outer Continental Shelf through direct credits against any tax or combination of taxes, other than severance taxes, owed to Louisiana. Since the First Use Tax is "deemed [to be] a cost associated with" the transportation and marketing of OCS and federal enclave natural gas (La. Rev. Stat. Ann. § 47:1303 C (West Supp. 1980)) (Mot. App. 5a), Louisiana consumers of such gas may effectively recoup the amounts attributable to that tax through a reduction in other state taxes. The legislative history indicates that the sole purpose of Act No. 599 is to ensure that Louisiana consumers do not incur any increased costs for natural gas as a result of the First Use Tax.[34]

In sum, the equivalence between the First Use Tax and the Louisiana Severance Tax suggested by the Master (Report 35) is illusory. Purchasers of gas subject to severance tax can shift the burden of the tax to the producer of gas but purchasers of gas subject to the "equivalent" First Use Tax cannot shift the burden of the levy other than onto the consumer. Thus, contrary to the Master's belief (*ibid.*), no adjustments in the base prices or allowances can be made that would reduce or eliminate this discrimination against the out-of-state consumer.[35]

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[33] Tax Credit for Electric and Natural Gas Service, 1978 La. Sess. Law Serv. 1112 (West), codified as La. Rev. Stat. Ann. § 47:11 (West Supp. 1980).

[34] *Hearings on H.B. 768 Before the Committee on Ways and Means of the Louisiana House of Representatives* 4 (Rep. Tauzin and unidentified speakers), 5 (colloquy between Reps. Sour and Bagert), 6 (Rep. Laborde) (June 5, 1978).

[35] The Master's reliance (Report 35) upon *Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937), is therefore misplaced. There,

Moreover, the burden of the First Use Tax falls entirely on out-of-state consumers of gas. The Louisiana First Use Tax therefore "falls short of the substantially even-handed treatment demanded by the Commerce Clause." *Boston Stock Exchange* v. *State Tax Comm'n, supra,* 429 U.S. at 332.

CONCLUSION

For the reasons stated, the plaintiffs' motion for judgment on the pleadings should be granted.

Respectfully submitted.

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the Court upheld a state use tax because it did not violate the Commerce Clause and it was a "compensating" tax intended to complement the state sales tax. Thus, the fact that Louisiana has a valid severance tax cannot save its unconstitutional First Use Tax even on the assumption that the latter levy may "compensate" for the severance tax.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

ON REPORT OF THE SPECIAL MASTER DATED SEPTEMBER 15, 1980

REPLY OF THE PLAINTIFF STATES TO LOUISIANA'S EXCEPTIONS

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REPLY OF THE PLAINTIFF STATES TO LOUISIANA'S EXCEPTIONS

INTRODUCTION

Rebuffed once when the Court granted the plaintiff states leave to file their complaint, ignored a second time by the pointed omission of its motion to dismiss from the list of matters referred to the Special Master by the Court for consideration,[1] and now rejected for a third time by the

[1] While the Special Master recognized that the Court had not specifically referred the motion to dismiss to him for consideration (as it had by name each and every other motion then pending), he believed that it came within the general thrust of the referral. Report at 10 n.9.

Report of the Special Master recommending denial of its motion to dismiss, Louisiana nevertheless persists in seeking to bar this exclusive original action. The defendant offers nothing in its exceptions to the Special Master's Report of September 15, 1980, that was not rejected by the Court more than eighteen months ago when it granted the request of the plaintff states to invoke the Court's exclusive original jurisdiction. To be sure, Louisiana has attempted to freshen its argument by reordering the issues and adding large doses of repetition, but nothing new or persuasive emerges.[2] All of the relevant facts and legal arguments were known by the Court in June 1979 when it granted leave to file the complaint in the face of the defendant's brief in opposition.[3] Even the tax refund suits filed by the pipeline companies in the Louisiana courts shortly after this Court exercised its exclusive original jurisdiction — now

[2] In recommending denial of the defendant's motion to dismiss, the Special Master noted:

> The grounds urged by the defendant for dismissal are substantially the same as the grounds on which the defendant opposed the plaintiffs' motion for leave to file their complaint.

Report at 10 n.9.

[3] The brief in opposition to a motion for leave to file has been aptly characterized as "the equivalent of a motion to dismiss" on jurisdictional grounds. R. Stern & E. Gressman, Supreme Court Practice 614 (5th ed. 1978). Thus:

> [E]ach complaint is first subjected to an initial examination for legal sufficiency (including matters of jurisdiction). The provision for a brief in opposition means that the Court wishes the defendant to present argument as to this. It is the equivalent of a motion to dismiss at the preliminary stage of the case.

Id.

Indeed, over the last few decades, the Court has consistently decided jurisdictional and prudential questions in original actions at the time it has acted on the motion for leave to file. *See, e.g.*, Arizona v. New Mexico, 425 U.S. 794 (1976); Pennsylvania v. New Jersey, 426 U.S. 660 (1976); Jones ex rel. Louisiana v. Bowles, 322 U.S. 707 (1944); Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387 (1938).

heralded by the defendant as a "new" ground for dismissal — were known to the Court when it acted initially. *See* Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae at 7 (June 1979). Thus, the Court's decision that this case was appropriate for its consideration necessarily rejected the defendant's arguments.

In addition to offering essentially repetitive exceptions, Louisiana espouses an alarmingly narrow reading of the Court's exclusive original jurisdiction. Under the defendant's theories, few if any original cases could ever be brought. Contrary to Louisiana's approach, under which the Court would not entertain interstate tax disputes or Commerce Clause violations, the Court's exclusive original jurisdiction is intended to provide a remedy for real and substantial injuries inflicted by one state on a sister state. *California v. Texas,* 437 U.S. 601, 614 (1978) (Justice Stewart, with whom Justice Powell and Justice Stevens joined, concurring).[4] For this reason, claims of serious magnitude and real and substantial injuries by one state to others are cognizable by the Court regardless of subject matter. *See* 12 Moore's Federal Practice ¶ 352.01 (2d ed. 1980) ("Since . . . the Court's original jurisdiction depends on the character of the parties, rather than upon the subject matter of the litigation, the subject matter may indeed be as varied as the complexities . . . government and society can spawn."). *Cf. California v. Arizona,* 440 U.S. 59, 68 n.8 (1979) ("[f]actual complexity" is not a reason justifying declination of exclusive original jurisdic-

[4] While the Court has declined in some instances, for prudential reasons, to involve itself in minor controversies between two states over the constitutionality of a tax, *see, e.g.,* Arizona v. New Mexico, 425 U.S. 794 (1976); Pennsylvania v. New Jersey, 426 U.S. 660 (1976), the Court has never suggested that it would not entertain an interstate tax dispute in an appropriate case, particulary where, as here, there are compelling reasons for the Court to exercise its exclusive original jurisdiction. *See infra* at 8-15.

tion). Once the Court determines that a case between the states is "appropriate," exercise of its exclusive original jurisdiction is "obligatory." *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972).[5] *See California v. Texas*, 437 U.S. 601, 606 (1978) (Justice Stewart, with whom Justice Powell and Justice Stevens joined, concurring).

The Court's acceptance of jurisdiction in this case will not, as the defendant urges, open the Court's docket to a flood of minor tax controversies.[6] Louisiana's argument ignores the fact that the Court's docket is subject to its discretion to determine the appropriateness of cases brought to it, and thus the Court is free to distinguish between minor controversies and the instant case, which the Special Master found is unique:

> The nature of this case seems appropriate for this Court's attention. It is important both because of the huge sums involved and because of the number of states affected, thirty in all. The issues are important on their own account and because of their effect on the price of gas.

Report at 19-20. It is also unique in the callousness of Louisiana's attempt to profit — to the extent of "about 300 million dollars a year" — at the expense of its sister states. See the legislative history of the First Use Tax package

[5] In Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972), this Court said:

> [T]he question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had.

The defendant's suggestion that this test has been converted into an issue-only analysis by the *per curiam* opinion in Arizona v. New Mexico, 425 U.S. 794 (1976), is without foundation. The *Arizona* case cites the quoted passage from *City of Milwaukee* with approval. *Id.* at 796-97.

[6] Significantly, there has been no appreciable increase in original actions over the last eighteen months as a result of the Court's acceptance of the plaintiffs' complaint.

described in the Brief in Support of the Exceptions of the Plaintiff States at 10-12, 13 n.5.

The defendant's repeated attempts to refer the plaintiffs to a state forum wholly inadequate in terms of relief and legal accessibility, *see infra* at 9-12, are simply a variation of its announced policy to delay resolution of this case as its gains continue. *See* Brief in Support of the Exceptions of Plaintiff States at 12. As the Court did in June 1979, and as the Special Master did in September, the Court, for the reasons stated below, should reject this policy of delay and instead reaffirm the Court's exercise of its exclusive original jurisdiction over this case.

ARGUMENT

I.

THE PLAINTIFF STATES ARE DIRECTLY AND GRIEVOUSLY HARMED BY THE FIRST USE TAX AND HAVE SUFFICIENT STANDING TO INVOKE THE EXCLUSIVE ORIGINAL JURISDICTION OF THE COURT.

Louisiana's attack upon the standing of the plaintiff states to maintain this case is based on the thesis that the defendant and its statutes have nothing to do with the high gas prices and attendant costs the plaintiffs' must absorb; that since the legal incidence of the tax falls on the pipelines, they are the real parties in interest; and hence that the plaintiff states are "volunteers" without a genuine interest at stake.

Contrary to Louisiana's argument, however, the plaintiffs' claim that the First Use Tax directly and immediately affects them and their citizens is in no way "spurious." *See* Louisiana's Brief in Support of Exceptions at 41. The text of the First Use Tax and its legislative history clearly and unequivocally disclose an intent on the part of the defendant that the cost of the tax be passed on to the plaintiff states and their citizens. *See* Brief in

Support of the Exceptions of Plaintiff States at 7-14. Recognizing this intended impact, the Special Master concluded that "although the tax is collected from the pipelines, it is really a burden on consumers," Report at 12, and that:

> It would be unfortunate if the parties who actually stand the loss were required to rely on an intermediary who had passed on the loss to them to press the claim of unconstitutionality. In this case the pipelines are in agreement with the plaintiffs, but their interest is different and the states [sh]ould be allowed to speak for themselves. I conclude they have standing to sue.

Id. at 13.

Thus, the states challenging the First Use Tax are not nominal plaintiffs. Cf. *Oklahoma v. Atchison, Topeka and Santa Fe Railroad,* 220 U.S. 277, 289 (1971). Nor are they bringing what amounts to a "collectivity of private suits." *Pennsylvania v. New Jersey,* 426 U.S. 660, 666 (1976). Rather, their challenge is justified by the fact that they are directly incurring higher costs "as consumers of natural gas forced to pay higher prices by reason of the first use tax." Report at 14. Moreover, as the Special Master noted:

> With respect to the injury done to the States by reason of the imposition of the additional costs on their citizens, the States do have a quasi-soverign interest in their economic welfare. The individuals affected are not a selected group but practically the entire population. Perhaps some large consumers and the public utilities have individual claims of sufficient size to justify suits; but by and large it would seem difficult if not impossible for individual consumers to establish sufficient damage to themselves and a class suit would seem to be unmanageable.

Id.

In sum, as the Special Master found, this case is "within the general class of cases in which the states have been recognized as proper parties." Report at 15. *See Pennsylvania v. West Virginia,* 262 U.S. 553 (1953); *Missouri v. Illinois,* 180 U.S. 208 (1901); *Kansas v. Colorado,* 206 U.S. 46 (1907); *New York v. New Jersey,* 256 U.S. 296 (1921); *North Dakota v. Minnesota,* 263 U.S. 365 (1923).

None of Louisiana's remaining contentions as to the standing of the plaintiff states merits extended discussion. The Eleventh Amendment is inapplicable. An action brought by one state against another violates the Eleventh Amendment *only* "if the plaintiff state is actually suing to recover for injuries to designated individuals." *Hawaii v. Standard Oil Co.,* 405 U.S. 251, 258 n.12 (1972). *See* R. Stern & E. Gressman, Supreme Court Practice 602 (5th ed. 1978). As just shown, that is not the case here.

Similarly, the Tax Injunction Act forbids injunctions only by district courts, not by the Supreme Court. 28 U.S.C. § 1341. Moreover, even the rule against injunctions is inapplicable if there is no "plain, adequate, and complete remedy" in state courts. *Matthews v. Rodgers,* 284 U.S. 521, 525 (1932). Clearly, the plaintiff states have no remedy, let alone a "complete and adequate" one in Louisiana's courts. *See* Report at 17-18. *See also infra* at 10-12.

Finally, there is no merit to Louisiana's renewed request for abstention in favor of her courts. The language and purpose of the First Use Tax, particularly as set forth in its graphic legislative history, is so clear that it is unnecessary to await construction by a state court. The sponsors of the First Use Tax package left no doubt about how the tax was intended to work and is, in fact, working. Accordingly, acceding to the defendant's request for abstention at this late hour, would serve only to advance

Louisiana's clearly articulated design to enrich itself by delaying the ultimate outcome of this litigation.[7]

II.

THE SUPREME COURT IS THE ONLY APPROPRIATE AND ADEQUATE FORUM IN WHICH THE CLAIMS OF THE PLAINTIFF STATES MAY BE LITIGATED.

The Special Master correctly found overwhelming reasons for the invocation of Supreme Court jurisdiction. Report at 15-20. Undeterred by detailed and explicit findings, Louisiana devotes the greater portion of its current brief[8] to contesting, once again,[9] the unassailable conclusion that the Supreme Court is the most — indeed only — appropriate and adequate forum in which the claims of the plaintiff states may be litigated and authoritatively resolved. The defendant's most recent brief offers no new showing that the Court erred when it rejected identical contentions and granted leave to file the complaint. For this reason, and because the Special Master's analysis of the motion to dismiss was careful and correct, the Court should overrule Louisiana's exceptions and deny the defendant's motion to dismiss.

Louisiana's claim that "the Special Master has misconceived both the philosophy and the values involved in the invocation and exercise of this Court's original jurisdic-

[7] Moreover, abstention is not appropriate where "there [is an] asserted conflict between what the state [statute seeks] to do and federal authority asserted by a federal agency." FPC v. Corporation Commission of Oklahoma, 362 F. Supp. 522, 546 (W.D. Okla. 1973) (three judge court), *aff'd*, 415 U.S. 961 (1974) (*mem.*). *Accord*, Public Utilities Commission of Ohio v. United Fuel Gas Co., 317 U.S. 456, 463 (1943).

[8] Louisiana Brief in Support of Exceptions at 11-29.

[9] *See, e.g.*, Louisiana Brief in Opposition to Motion for Leave to File Complaint at 10-18; Louisiana Brief in Support of Motion to Dismiss at 15-21; Louisiana Brief in Opposition to Motion of New Jersey for Leave to Intervene at 4-6.

tion," Louisiana Brief in Support of Exceptions at 13,[10] is particularly hollow. The Special Master specifically recognized those values at the start of his analysis where he painstakingly took note of the fact that the Court "can, and will, refuse to accept jurisdiction of a case where there are other and better ways of handling the dispute." Report at 15. The Special Master next carefully considered each of Louisiana's suggested alternatives and rejected each one as the Court has already done. *Id.* at 16-20.

Louisiana finally appears to recognize, albeit *sub silentio,* that two of the presently pending suits — the state court declaratory judgment proceeding instituted by Louisiana and the Federal Energy Regulatory Commission's federal district court case against state officials — are not appropriate alternatives to the present action. Nevertheless, the defendant continues to maintain that the Louisiana state court tax refund suits filed by various pipeline companies are appropriate alternatives to Supreme Court adjudication of this case. Louisiana Brief in Support of Exceptions at 11-12, 19-22.

There are, however, a number of reasons why the Court should hold, as the Special Master recommends, that the tax refund suits are not appropriate alternatives to the continued exercise of this Court's exclusive original jurisdiction. Report at 17-18. To begin with, while the tax refund suits were not filed until after the Court's decision, on June 18, 1979, to exercise its original jurisdiction, the Court was explicitly advised that tax refund litigation was in the offing before it granted leave to file the complaint. Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae at 7 (June 1979). And, of course, the tax refund suits were already pending

[10] The defendant's extended discussion of its concept of "[t]he rationale of original jurisdiction," Louisiana Brief in Support of Exceptions at 13-17, significantly fails to mention, let alone distinguish, between original *but not* exclusive jurisdiction cases and original *and* exclusive jurisdiction cases.

when Louisiana first filed its motion to dismiss, and the Court omitted any mention of this motion in referring all of the other motions to the Special Master. Thus, the defendant's continued reliance on the pipeline companies' tax refund litigation makes light of the Court's earlier decisions to exercise its exclusive original jurisdiction. *See supra* at 1-2.[11]

The defendant also ignores the patent deficiencies in the Louisiana tax refund suit mechanism that were called to the Court's attention by the United States before the Court's exercise of jurisdiction. Brief for the United States and the Federal Energy Regulatory Commission at 7 (June 1979) ("Neither injunctive nor declaratory relief against collection of the tax is available. La. Rev. Stat. Ann. § 47:1575, § 47:1576 (West)."). Without permanent injunctive relief, which would not be available in the refund litigation,[12] Louisiana could continue — even after the local courts had directed refunds — to collect millions

[11] The defendant's argument also ignores that whatever state court proceedings occur after the Court's exercise of its original jurisdiction are irrelevant to the conduct and disposition of this case. *Cf.* Steffel v. Thompson, 415 U.S. 452, 462 (1974) (abstention unnecessary in absence of pending state proceedings); Ex Parte Young, 109 U.S. 123, 161-62 (1908) ("when such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject-matter of inquiry in a suit already pending in a Federal court, the latter court, *having first obtained jurisdiction over the subject matter*, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed.") (emphasis added).

[12] Permanent injunctive relief is prayed for by the plaintiff states to put a stop to continued collection of the First Use Tax. Complaint at 27. On the other hand, the pipeline companies' tax refund suits, even if eventually successful, could at most provide for refunds of monies already collected, a remedy which this Court has deemed inadequate in the past. FPC v. Tennessee Gas Transmission Co., 371 U.S. 145, 154-55 (1962).

of dollars in tax payments[13] at the expense of the plaintiff states as consumers of natural gas and to the irreparable injury to their interests in protecting their economies from the enormous impact of the First Use Tax.

Moreover, should the Court divest itself of its original and exclusive jurisdiction over this matter, no other forum will be available to the plaintiff states to litigate these fundamental issues. Recognizing that even though by Louisiana's design the plaintiff states suffer the brunt of the First Use Tax, they are not "taxpayers" who may participate in the Louisiana refund litigation, the Special Master found:

> [T]he plaintiff States have no standing [in the refund litigation] and the [Louisiana] court apparently has no authority to grant injunctive relief pending the outcome of the cases. The refunds, if ordered, appear to be limited as to interest to 6% which would result in a substantial advantage to the State and damage to the plaintiffs in view of the quarter of a billion dollars which is being collected annually. But, in any event, the plaintiffs should not be required to depend on private parties to conduct their litigation and protect their interests; they should be permitted to speak for themselves.

Report at 17-18.

Nevertheless, the defendant blithely suggests that there is "[n]othing in Louisiana law or procedure preclud[ing] another sovereign state from intervening or otherwise participating in a Louisiana tax refund proceeding, *assuming that state can assert or allege an interest.*" Louisiana Brief in Support of Exceptions at 27 (emphasis added). Apart from the Special Master's conclusion and the

[13] *See* Brief in Support of the Exceptions of the Plaintiff States at 12, 14; Hargorder, *1st Use Tax Will Profit La. Even If Cash Is Returned*, The Times-Picayune, Oct. 7, 1980, § 1 at 17, *reprinted in* Brief in Support of the Exceptions of the Plaintiff States at 1a.

defendant's transparent position that the plaintiff states would not be able to allege a sufficient interest in the tax refund proceedings, there stands a more determinative point.

Louisiana has lost sight of the fact that Congress has mandated that the Supreme Court of the United States, not the court of any state, be the *exclusive* arbiter of disputes between sister states. 28 U.S.C. § 1251(a). *Cf. Plaquemines Tropical Fruit Co. v. Henderson,* 170 U.S. 511 (1898) (state courts may entertain controversies between a state and citizens of another state *because* such suits are *not* within the Supreme Court's exclusive jurisdiction); *State Water Control Board v. Washington Suburban Sanitary Commission,* 61 F.R.D. 588 (D.D.C. 1974) (intervention by Maryland would convert action to a suit between two states and thereby destroy federal district court's jurisdiction).

Finally, requiring resort to a Louisiana court would run counter to the rationale for the exclusive original jurisdiction of the Court over cases involving the states: "[N]o State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own." *Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. 493, 500 (1971). As between the local courts of Louisiana and this Court, the latter is the only suitable forum for deciding the clear and fundamental issues raised in this case.

Louisiana's continued reliance upon *Arizona v. New Mexico,* 425 U.S. 794 (1976), is clearly misplaced. The Court's refusal to exercise its original jurisdiction there was premised on its finding that an appropriate alternative forum existed in which the case could be litigated. *Id.* at 797. Since, as is demonstrated above, there is no appropriate alternative forum here, *Arizona v. New Mexico*

is of no help to Louisiana. In addition, prudential considerations, not present in the *Arizona* case, support the exercise of the Court's exclusive original jurisdiction here.

A number of these were noted by the Special Master. Report at 19-20. Specifically, he concluded that:

> [T]he really significant difference is that, by reason of its relationship to one of the litigants, Arizona could be heard in its own behalf in the State court. The plaintiffs here cannot represent themselves in the State court proceedings . . . .
>
> [I]n the Arizona case the issue was decided on the motion for leave to file. This Court has granted that motion in this case, permitting the filing, and to dismiss it now *on grounds raised on consideration of the motion* would . . . penaliz[e] the plaintiffs both in time and money.
>
> The nature of this case seems to be appropriate for this Court's attention. It is important both because of the huge sums involved and because of the number of States affected, thirty in all. The issues are important on their own account and because of their effect on the price of gas.

Id. (emphasis added).

In addition to the differences noted by the Special Master, there are other significant grounds for distinguishing *Arizona v. New Mexico*. For example, the three Arizona utilities affected by the tax were able to protect their and the state's interests effectively by refusing to pay the tax and bringing a declaratory judgment action challenging its validity on the same constitutional grounds as those presented by Arizona in its original complaint. Thus, unlike the plaintiff states who have already suffered hundreds of millions of dollars lost to Louisiana's unconstitutional taxing scheme, Arizona did not allege, and did not face, any immediate harm from the challenged tax. Moreover, promptly after the litigation in the state courts, this Court held the New Mexico tax

invalid. *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979). Thus, within three years of the imposition of the tax, the matter was definitively resolved without any substantial disruption of the rate structure to interstate consumers as a result of the tax.

This case stands in stark contrast. Resolution of the urgent issues in this case will clearly not be expeditions in the local courts of Louisiana. Well over two years have already passed since the first of the Louisiana proceedings was filed, and all of the state court cases remain stalled. For example, the tax refund litigation, so highly touted by the defendant, began almost eighteen months ago, after this Court assumed jurisdiction, and is less far advanced than the present case. *See* Reply of Pipeline Companies at 2-3 (Dec. 5, 1980). And even the first filed of the local cases — Louisiana's declaratory judgment action — has gone essentially nowhere. *Id.*

Moreover, during the prolonged period these cases could be expected to last, there would continue to be enormous disruptions of the rate structure applicable to interstate consumers. The population in some thirty gas consuming states has already been subjected to hundreds of millions of dollars in additional charges before the constitutionality of the First Use Tax is even determined. Interstate pipeline companies subject to the tax have no option but to pay it. Louisiana law, unlike the law of New Mexico, does not permit taxpayers to refuse payment and challenge the validity of taxes in declaratory judgment actions. Because the tax has been paid since May 31, 1979, La. Rev. Stat. Ann. § 47:1305B (West. Supp. 1980), the First Use Tax has since that time had an immediate and direct impact on the

rates paid for natural gas by the plaintiff states and their citizens.[14]

Finally, unlike *Arizona v. New Mexico,* this case raises issues of national significance and federal law. Not only is there a conflict between the First Use Tax and federal energy regulation that was not raised by Arizona's challenge to the New Mexico electrical energy generation tax, but this case involves a challenge (by a cross section of the states representing multiple regions of the country) to the use by a defendant (hundreds of miles away) of a facially discriminatory tax to collect hundreds of millions of dollars annually. If Louisiana is allowed to impose its First Use Tax upon natural gas in interstate commerce, other states could race to impose countervailing measures on comparable products and our national economy would regress into the precise interstate feudalism that our Constitution and our federal system were designed to prevent.

In these circumstances, the plaintiff states urge, the prudential considerations underlying the declination of original jurisdiction in *Arizona v. New Mexico* are inapplicable. On the contrary, this case presents "a matter of grave public concern in which the state[s], as the representative[s] of the public, [have] an interest apart from that of the individuals affected." *Pennsylvania v. West Virginia,* 262 U.S. 553, 592 (1923).

[14] The possibility that in the future refunds will reach those who bear the ultimate economic burden of the tax is dubious. Precisely because of these doubts, the Court has held that the refund remedy is an inadequate protection for consumers under the Natural Gas Act. *See, e.g.,* FPC v. Hunt, 376 U.S. 515, 524-525 (1964). *Accord,* FPC v. Tennessee Gas Transmission Co., 371 U.S. 145, 154-55 (1962).

CONCLUSION

"This Court has original and exclusive jurisdiction of disputes between two or more States, 28 U.S.C. § 1251(a)(1), and it has a responsibility to exercise that jurisdiction when it is properly invoked. See *Cohens v. Virginia,* 6 Wheat. 264, 404; *Massachusetts v. Missouri,* 308 U.S. 1, 19-20." *California v. Texas,* 437 U.S. 601, 606 (1978) (Justice Stewart, with whom Justice Powell and Justice Stevens joined, concurring).

For this reason, and for those appearing in the plaintiff states' Brief in Support of Motion for Leave to File Complaint (Mar. 29, 1979), their Brief in Opposition to Motion to Dismiss (Nov. 14, 1979), the Report of the Special Master (Sept. 15, 1980), and this brief, the plaintiff states urge that Louisiana's exceptions be overruled and accordingly that the motion to dismiss be denied.

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IN THE

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OCTOBER TERM, 1980

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

versus

STATE OF LOUISIANA,

Defendant

On Report of the Special Master
Dated September 15, 1980,

REPLY OF STATE OF LOUISIANA TO EXCEPTIONS AND SUPPORTING BRIEF OF THE PLAINTIFF STATES

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On Report of the Special Master
Dated September 15, 1980

REPLY OF STATE OF LOUISIANA TO EXCEPTIONS AND SUPPORTING BRIEF OF THE PLAINTIFF STATES

This Court has afforded the State of Louisiana the opportunity to reply to the exceptions and supporting brief filed by the plaintiff States, with reference to the Special Master's recommendation that the plaintiffs' motion for judgment on the pleadings be denied.

RULES INVOLVED

Supreme Court Rule 9.2

The form of pleadings and motion in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those Rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this Court.

Federal Rule of Civil Procedure 12(c)

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

STATEMENT OF THE CASE

The procedural story of the plaintiffs' motion for judgment on the pleadings is a short one.

On September 18, 1979, after the complaint and answer had been filed, the plaintiff States filed a motion for judgment on the pleadings, with supporting brief. On October 22, 1979, the State of Louisiana filed a document combining (1) its motion to

dismiss the complaint, and supporting brief, and (2) its brief in opposition to the plaintiffs' motion for judgment on the pleadings.

Shortly thereafter, on November 5, 1979, the seventeen pipeline taxpayers filed in this Court a motion for leave to file their own motion for judgment on the pleadings, with supporting brief. The Special Master did not address these two taxpayer motions and made no recommendations concerning them. Because the taxpayers have not been granted leave to file their motion for judgment on the pleadings, the State of Louisiana has deemed it premature to respond to that motion.

Sometime earlier, on August 28, 1979, the seventeen pipeline companies had filed in this Court a "Motion for Leave to Intervene as Plaintiffs and to File Complaint, Brief in Support of Motion and Complaint of Intervenors." The State of Louisiana promptly filed its opposition to that motion. The matter was subsequently dealt with by the Special Master. In his Report dated May 14, 1980, the Special Master recommended that this intervention motion of the pipeline companies be granted, but made no decision on their motion to file a complaint. The intervention issue is now before this Court on Louisiana's exceptions to the May 14 Report of the Special Master.

It has never been entirely clear whether the pipeline companies, as putative intervenors, seek merely to support the plaintiff States' motion for judgment on the original pleadings, or whether they also seek some sort of judgment on the basis of the complaint in intervention that they have sought to file. This ambivalence became most evident when the pipeline taxpayers, on November 14, 1980, filed a motion in this Court for leave to file exceptions to the Special Master's Report of September 15, 1980, which recommended denial of the plaintiff States' motion for judgment on the original pleadings. This latest motion by the putative intervenor-taxpayers was accompanied by five exceptions and a supporting brief. The taxpayers' motion asserts (at 3) that although the September 15 Report of the Special Master "is in terms directed solely to the motion submitted by the plaintiffs,

it in effect disposes of the pipeline companies' motion for judgment on the pleadings as well." Unanswered is the question whether the pipeline companies' tendered exceptions and arguments are directed primarily or in substantial part to the Special Master's "in effect" denial of the pipeline companies' tendered but unaccepted motion for judgment on their own pleadings.

The position of the United States (and the Federal Energy Regulatory Commission) respecting the pending motion of the plaintiff States has also been procedurally confusing. Early on, in June of 1979, the United States and the Commission filed a brief *amici curiae* in support of the plaintiff States' motion to file their complaint. This Court granted leave to file on June 18, 1979.

Following the filing of the plaintiffs' motion for judgment on the pleadings, the United States and the Commission filed on November 20, 1979, a brief *amici curiae* in support of plaintiffs' motion. The State of Louisiana duly responded to that *amici* brief.

When this Court appointed the Special Master, it referred to him the plaintiffs' pending motion for judgment on the pleadings. Before the Special Master, the United States and the Commission continued to support that motion. But their status as proponents of the motion seemingly changed when the Special Master, in his first Report, recommended that the United States and the Commission be allowed to intervene as parties plaintiffs and to file their complaint in intervention. That recommendation has yet to be accepted by the Court.

When the Special Master filed his second Report on September 15, 1980, recommending denial of the plaintiffs' motion, the United States and the Commission duly filed an "Exception and Brief in Support of Exception," a document now before this Court. The sole exception was to the Report of September 15 insofar as it "recommends that the plaintiffs' motion for judgment on the pleadings be denied."

The Solicitor General has subsequently realized the United States and the Commission are not presently intervening party-plaintiffs to this case so as to entitle them to file such an "Exception" to the September 15 Report. Under date of November 15, 1980, the Solicitor General has asked the Court to ignore the "Exception" and to treat the supporting brief as another submission *amici curiae*.

Out of this procedural history, the State of Louisiana can deduce that the only motion for judgment on the pleadings before this Court at this time is the motion filed by the plaintiff States on September 18, 1979 — which was the motion addressed by the Special Master in his second Report. The State of Louisiana further assumes that the only viable exceptions to the Special Master's recommended denial of that motion are those specified by the plaintiff States. The arguments of the other putative intervenor-plaintiffs are to be viewed as submitted either on requested leave of Court or on an *amici* basis.

ARGUMENT

I.

THE JURISDICTIONAL AND PRUDENTIAL PROBLEMS ABOUNDING IN THE REQUESTED JUDGMENT ON THE PLEADINGS WARRANT DISMISSAL OF THE COMPLAINT

Once again the jurisdictional and prudential problems that plague the plaintiff States' complaint have been dramatically exposed. The efforts of the plaintiff States to secure from this Court a summary-type judgment, inuring to the benefit of private taxpayers, underscore the propriety and advisability of granting the State of Louisiana's motion to dismiss the complaint.

Nowhere are these problems more evident than in the exceptions and briefs filed with reference to the Special Master's recommendation that the plaintiffs' motion for judgment on the

pleadings be denied, albeit without prejudice to later renewal. The documents filed by the plaintiff States and the putative intervenor-plaintiffs reveal a remarkable confluence of (a) identical constitutional issues, (b) identical factual statements,[1] and (c) identical supporting arguments. And, under the aegis of the plaintiff States' complaint, these identical considerations are combined in support of all the declaratory, injunctive and tax refund relief that the private pipeline taxpayers could possibly seek or desire.

There can be no mistake about the nature and the import of the judgment on the pleadings that the plaintiff States, the United States (and the Federal Energy Regulatory Commission), and the private pipeline taxpayers so assiduously seek. One need look no further than the final paragraph of the plaintiff States' brief (at 40-41) in support of their exceptions to be reminded that this entire original proceeding, from the complaint to the requested judgment on the pleadings, is directed to three major ends:

> (1) A declaratory judgment by this Court that the Louisiana First Use Tax statute is unconstitutional and unenforceable with respect to natural gas transported or sold in interstate or foreign commerce;
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> (2) A permanent injunction, to be issued by this Court, "prohibiting the defendant [State of Louisiana] and its agents and employees from collecting the First Use Tax" with respect to such natural gas; and
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> (3) An order by this Court "that any and all revenues collected pursuant to the First Use Tax with respect to natural gas transported or sold in interstate commerce be refunded *to the taxpayers* together with interest earned thereon." Supporting brief of plaintiff States at 40 (emphasis added).

Such is the nature of the judgment that the plaintiff States

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[1]See, e.g., the statement in footnote 3, page 7, of the pipeline companies' brief in support of their profferred exceptions: "In order to avoid repetition, the pipeline companies adopt the statement of the case set out in the brief in support of exceptions being filed by the plaintiffs."

would have this Court enter. Such is also the nature of "the plaintiffs' motion for judgment on the pleadings" that the United States and the Federal Energy Regulatory Commission urge "should be granted." Brief of United States and FERC tendered on behalf of exception, at 42. More importantly, such is also the substance and effect of the judgment on the pleadings that the private pipeline taxpayers, as putative intervenor-plaintiffs, would have this Court enter. Apparently satisfied that the judgment sought by the plaintiff States will insure a tax refund and an injunction against further tax collection, the pipeline taxpayers seek to file their own motion for judgment on the pleadings that would have this Court simply hold (a) that Louisiana's First Use Tax is "void on its face" under the Supremacy Clause, and (b) that the tax "is void on its face" under the Commerce Clause.[2]

A. Jurisdictional consequences

From this tripartite melange of coordinated objections to the recommended denial of the plaintiffs' motion for judgment on the pleadings emerge two of the major jurisdictional and prudential considerations suggested in Louisiana's pending motion to dismiss. First, the judgment that this Court is being asked to

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[2]Motion of pipeline companies for leave to file exceptions to the Report of the Special Master, exceptions, and brief in support thereof, at 38-39. This Court has not acted on that motion.

The pipeline companies err (Brief at 38) in referring to the Special Master's recommendation that the "motions" for judgment on the pleadings should be denied. The Special Master addressed only the motion filed by the plaintiff States. He did not address the pipeline companies' earlier motion for judgment on the pleadings, a motion which the companies now seek to renew before this Court. Perhaps this erroneous reference to plural motions having been considered by the Special Master reflects the statement in the pipeline companies' pending motion to file exceptions to the September 15 Report (at 3) that "although the report is in terms directed solely to the motion submitted by the plaintiffs, it in effect disposes of the pipeline companies' motion for judgment on the pleadings as well." In other words, the pipeline companies seek to file exceptions to something that the Special Master did not do in fact but only "in effect."

render is one tailored by the plaintiffs for the exclusive benefit of the pipeline taxpayers. Despite their claimed injuries as consumers and *parens patriae* for consumer citizens, the plaintiff States seek no remedy or relief in the requested judgment that would directly alleviate their alleged injuries. There is no prayer that this Court order that credits be made on the consumers' gas bills, or that the taxpayers be enjoined from further passing on the cost of the First Use Tax. The entire complaint, including the prayers for relief and the requested judgment thereon, is constructed on the notion that if the private taxpayers are relieved from the burden of the Louisiana tax, and if the private taxpayers are awarded tax refunds, the beneficial consequences will eventually trickle back to the consumers. Presumably, the consumers would then be given certain credits or rebates on their gas bills, and future billings would not reflect the cost of the First Use Tax that the pipeline companies have seen fit to pass on to them.

At the same time, it seems clear that the plaintiff States could obtain precisely the same trickle-down relief from their consumer complaints if the pipeline taxpayers prevail in their pending tax refund suit in Louisiana. There the taxpayers are seeking — as are the plaintiffs in this Court — a declaration of the invalidity of the First Use Tax and a resulting refund of taxes paid. If the taxpayers secure that refund in the Louisiana courts, the consumer interests of the plaintiff States would be fully satisfied, subject only to the appellate review powers of this Court.

Thus the critical thrust of the judgment here sought is an order directing that all revenues collected by Louisiana pursuant to the First Use Tax statute be refunded to the seventeen pipeline taxpayers, who are not formal parties to this proceeding.[3] That fact,

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[3]Cf. *South Dakota v. North Carolina*, 192 U.S. 286, 320, 321 (1904), where the Court took note of the constitutional principle that this Court "has no jurisdiction in any case where it cannot render judgment in the legal sense of the term," and further noted "the difficulty of enforcing a judgment for money against a state by reason of its ordinary lack of private property subject to seizure upon execution." See also *Virginia v. West Virginia*, 246 U.S. 565 (1918).

made so evident by the present exceptions and briefs, transforms this proceeding into one outside the pale of this Court's original jurisdiction. The plaintiff States are seeking to invoke and use the original powers of this Court to prosecute the purely personal tax refund claims of the pipeline companies, intending thereby to obtain some indirect and derivative benefits. This Court's original jurisdiction evaporates once it becomes apparent, as is true here, "that the name of the state is being used simply for the prosecution in this court of the claim of the railroad company [or the pipeline companies in this instance], and our original jurisdiction cannot be maintained." *Kansas v. United States*, 204 U.S. 331, 341 (1907). See also *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 395-96 (1938); *Oklahoma v. Atchison, T. & S.F. R.R. Co.*, 220 U.S. 277, 289 (1911).

There are still more jurisdictional complications evident from the judgment that the plaintiff States ask this Court to enter. This is something more than a patent attempt by the plaintiffs to volunteer to secure a judgment for the benefit of private taxpayers. It is also a patent attempt by the private taxpayers (a) to use the plaintiff States as surrogates for securing the collection of their tax refunds, and (b) to inject themselves and their personal tax interests into this original proceeding. Not content merely to express their interests and concerns, the pipeline taxpayers have sought to intervene as party plaintiffs, to file their own "complaint in intervention" pursuant to the original jurisdiction of this Court under Article III, to file their own motions for judgment on their pleadings, and to file exceptions to the second Special Master's Report on the theory that he "in effect" denied their first motion for such a judgment.

Never before in this Court's original jurisprudence has there been such candid evidence of an effort by private citizens — the real taxpaying parties in interest — to seek redress in this Court for their tax grievances against a sovereign State. The Eleventh Amendment flatly bars any such suit "commenced or prosecuted against one of the United States by Citizens of another State." See *New Hampshire v. Louisiana*, 108 U.S. 76 (1883); *North*

Dakota v. Minnesota, 263 U.S. 365 (1923). That result follows whether this proceeding be viewed as one in the name of the intervenor-plaintiffs or one in the name of the plaintiff States as volunteers for those private tax refund claimants. The plaintiff States simply have no standing or faculty to make an imperative demand upon a sister State that it pay the tax refund claims allegedly owed to private citizens. *New Hampshire v. Louisiana*, *supra*. 108 U.S. at 90-91.[4]

The *New Hampshire* ruling adds yet another dimension to the jurisdictional morass in this case. In speaking of situations where the private citizen has some alternative method of pursuing his claims against a State (as is certainly true here), the Court remarked that its original jurisdiction need not be invoked

> . . . except under very extraordinary circumstances, if the citizens can themselves employ the identical and only remedy open to the government if it takes on itself the burden of the prosecution. . . . Certainly, when he can sue for himself, there is no necessity for power in his State to sue in his behalf, and we cannot believe it was the intention of the framers of the Constitution to allow both remedies in such a case. Therefore, the special remedy, granted to the citizen himself, must be deemed to have been the only remedy the citizen of one State could have under the Constitution against another State for the redress of his grievances, except such as the delinquent State saw fit itself to grant.

Thus the availability of the tax refund procedure in Louisiana, where the taxpayers can fully litigate the constitutionality of the

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[4]The pipeline companies have suggested that Louisiana may have waived its Eleventh Amendment immunity to original suits brought in this Court by private citizens of another state by enacting LA-R.S. 47:1576. It is dubious whether a state can waive its immunity with respect to original actions. But the cited Louisiana statute by its terms constitutes a consent only to the institution of suits in state or federal courts for adjudication of suits to recover taxes paid under protest. See *United Gas Pipe Line Company v. Whitman*, 595 F.2d 323 (5th Cir. 1979). The proposed complaint of the pipeline companies, however, does not seek recovery of the first use taxes paid under protest.

tax in question and their claims for refund, puts the final nail in the jurisdictional coffin of this purported original proceeding.

B. Prudential consequences

The exceptions and briefs relative to the recommended denial of the plaintiffs' motion highlight still another major justification for dismissing the complaint. That justification, prudential in nature, is epitomized by the ruling in *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976), discussed at length in Louisiana's brief (at 22-29) in support of its exceptions to the Special Master's recommendation that the motion to dismiss be denied. In *Arizona* the Court held that exercise of its original jurisdiction should be declined whenever a

> . . . pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated. [emphasis in original]

No one disputes the pendency of a forum in Louisiana in which the real parties in interest, the pipeline taxpayers, may pursue their tax refund claims. Nor is there any denial of the fact that this Court has previously determined that this particular Louisiana tax refund procedure is "an adequate remedy to the taxpayer," making it inappropriate for any federal court to intervene in a Louisiana tax controversy. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 301 (1943).

Indeed, there has yet to be any denial of the fact, which is critical in applying the *Arizona* prudential doctrine, that the Louisiana procedure provides a forum in which "the *issues* tendered here may be litigated." But if there be any lingering doubts on that score, they are dissipated by the demonstration before this Court of the total identity of the issues tendered here by the plaintiff States and the issues being raised and tendered by the pipeline taxpayers in their tax refund suit in Louisiana. Every issue being tendered here will be litigated and resolved in that tax refund suit, as shown by the following comparison of issues tendered here with issues to be litigated in the Louisiana

tax refund procedure.[5]

Issues tendered here by various parties	Issues to be litigated in tax refund suit
1. The plaintiffs, the United States and the pipeline companies all assert the invalidity of the Louisiana First Use Tax under the Supremacy Clause. All parties cite and rely upon the Natural Gas Act and the Natural Gas Policy Act of 1978 in this connection, but only the plaintiffs and the pipeline companies include the Outer Continental Shelf Act and the Coastal Zone Management Act in their supremacy claims.	1. The pipeline companies have asserted and are litigating the invalidity of the Louisiana First Use Tax under the Supremacy Clause. The pipeline companies cite and rely upon all four federal statutes used by the plaintiffs in this Court in support of their supremacy claims.
2. The plaintiffs, the United States and the pipeline companies all assert the invalidity of the Louisiana First Use Tax under the Commerce Clause in two respects: (a) unlawful discrimination against interstate commerce; (b) lack of apportionment and risk of multiple taxation.	2. The pipeline companies have asserted and are litigating the invalidity of the Louisiana First Use Tax under the Commerce Clause on precisely the same two grounds tendered by all parties in this Court.

[5]The issues tendered in this Court by the plaintiffs, as well as by the putative intervenors, are evidenced by the complaint filed in this Court by the plaintiff States and by the complaints in intervention that the United States and the pipeline companies seek leave to file. The plethora of exceptions and supporting briefs that the plaintiffs and would-be plaintiffs have filed or sought to file, with reference to the Special Master's recommendation that the motion for judgment on the pleadings be denied, provide the fullest demonstration of the issues being tendered to this Court.

As to the issues being tendered by the pipeline companies in their tax refund suit in Louisiana, see the complaint filed in that case. The complaint is reproduced as an appendix to the Brief of State of Louisiana in Response to Brief for the United States and the Federal Energy Regulatory Commission as

It is significant that, as revealed in the exceptions and briefs now before this Court, the issues being tendered by the plaintiff States are indistinguishable from those being tendered on behalf of the putative intervening taxpayers. The plaintiff States have tendered no separate issues here that will escape litigation in the tax refund suit. And because the consumer interests and concerns expressed here by the plaintiff States are derivative from the pipeline taxpayers' interest and concerns in upsetting the Louisiana First Use Tax, there can be no question as to the adequacy of the taxpayers' representation of those derivative interests in pursuing their tax refund litigation.

In summary, the exceptions and brief filed herein by the plaintiff States nowhere assert or demonstrate that their tendered constitutional issues and their derivative consumer interests cannot or will not be advanced and resolved in the Louisiana litigation. Nor do the aggrieved pipeline taxpayers anywhere assert that the issues being tendered in this Court by the plaintiffs are so different from those the taxpayers are advancing in the tax refund suit that their tax grievances cannot be fully resolved in this original proceeding. Indeed, the only given reason for the taxpayers' campaign to participate fully in this proceeding as intervenor-plaintiffs is not to assert any different issues but to present a "different perspective" on the issues already tendered by the plaintiff States.[6]

This Court need not exercise its original jurisdiction merely to allow private citizens to express a "different perspective" on issues tendered here by surrogate State plaintiffs. The availability and adequacy of the state court forum to resolve all perspectives of the constitutional issues at stake reinforce the applicability of the *Arizona* prudential principle. Nothing said in the present exceptions and briefs casts doubt on such applicability.

Amici Curiae, at A-1 to A-11, filed in this Court (with a gray cover) on December 5, 1979.

[6]See Motion of pipeline companies for leave to file exceptions to the Report of the Special Master, exceptions, and brief in support thereof, at 3, 4, 7 (filed November 14, 1980). But see footnote 2, *supra*.

II.

THE MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD BE DENIED

The plaintiffs' motion for judgment on the pleadings need be addressed only if the Court disagrees with Louisiana's position that dismissal of the complaint is warranted by the jurisdictional, standing and prudential considerations set forth in Louisiana's motion to dismiss.

The Special Master's Report of September 15, 1980, recommends that the motion for judgment on the pleadings "be denied without prejudice to a reconsideration of the issues raised on the basis of further proceedings." Second Report of the Special Master, at 38.[7] For a variety of reasons, that recommendation should be accepted by the Court. The proponents of the motion have not met the extremely high burden of demonstrating the utility and propriety of such a summary procedural device in this case. This is, after all, a major piece of constitutional litigation brought in the context of this Court's original jurisdiction.

A. Impropriety of the motion in constitutional litigation

This Court's Rule 9.2 states that, where appropriate, the Federal Rules of Civil Procedure "may be taken as a guide to procedure in original actions in this Court." *Utah v. United States*, 394 U.S. 89, 95 (1969).[8] And since the plaintiffs saw fit to employ the procedural device known as a motion for judgment

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[7]The Special Master does not explain how "further proceedings," presumably evidentiary in nature, could make it any more appropriate or possible, than it now is, to grant a motion for judgment premised solely on the pleadings now on file.

[8]But the Court has warned that procedures governing the exercise of its original jurisdiction "are not invariably governed by common-law precedent or by current rules of civil procedure." *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973).

on the pleadings, the relevant Civil Rule becomes Rule 12(c), which in pertinent part reads:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

The plaintiff States' motion for judgment on the pleadings, like its supporting brief, does not cite or mention Civil Rule 12(c) and does not attempt to show compliance with the accepted standards for granting a Rule 12(c) motion. The plaintiffs' pending exceptions and supporting brief, relating to the recommended action on the motion, are equally devoid of any recognition of or reliance on the Rule 12(c) requirements. Nor do plaintiffs claim that it is inappropriate in this original setting to follow the standards of Rule 12(c).

The Rule 12(c) standards can be more easily stated than satisfied.[9] Federal courts, including this Court, have traditionally followed "a fairly restrictive standard in ruling on motions for judgment on the pleadings." 5 C. Wright & A. Miller, *Federal Practice and Procedure*, §1368 at 689 (1969). Thus a motion by a plaintiff for judgment on the pleadings can be granted only where the complaint states a cause of action and where the

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[9]We do not pause to consider whether the plaintiffs' motion was premature under the first clause of Rule 12(c), which makes the motion timely only after the pleadings are closed. In this case, the Special Master has recommended that at least three other groups be allowed to intervene as plaintiffs and to file their own complaints - the State of New Jersey, the United States and FERC, and the seventeen pipeline companies. The defendant, the State of Louisiana, has not had any opportunity to answer those additional complaints. But until answers are filed, are the pleadings "closed" for purposes of Rule 12(c)?

Professors Wright and Miller have written: "Rule 7(a) provides that the pleadings are closed upon the filing of a complaint and answer, unless a counterclaim, cross-claim, or third-party claim is interposed, in which event the filing of a reply, cross-claim answer, or third-party answer normally will mark the close of the pleadings." 5 C. Wright and A. Miller, *Federal Practice and Procedure*, §1367 at 687 (1969). See also *Dorgan v. International Harvester Co.*, 585 F.2d 1380 (8th Cir. 1978); *Edelman v. Locker*, 6 F.R.D. 272 (E.D.Pa. 1946); *Van Dyke v. Broadhurst*, 28 F.Supp. 737 (D.Pa. 1939), all holding that a motion for judgment on the pleadings is premature where the opposing party has had no opportunity to file an answer.

defendant's answer fails as a matter of law to controvert at least one material allegation.[10] Put differently, the motion

> ... is designed to provide a means of disposing of cases when the material facts are not in dispute and a judgment on the merits can be achieved by focusing on the content of the pleadings and any facts of which the court will take judicial notice. The motion ... only has utility when all material allegations of fact are admitted in the pleadings and only questions of law remain.
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> 5 C. Wright and A. Miller, *Federal Practice and Procedure*, §1367 at 685 (1969)

Thus it has become established that, in determining the appropriateness of granting a judgment on the pleadings under Rule 12(c), all reasonable allegations of fact in the non-mover's pleading are assumed to be true, while the contravening allegations in the movant's pleading are deemed false. As was said in *Beal v. Missouri Pacific R.R. Corp.*, 312 U.S. 45, 51 (1941), "[u]pon such a motion denials and allegations of the answer which are well pleaded must be taken as true." See also *Clark v. Allen*, 331 U.S. 503, 516 (1947); *National Metropolitan Bank v. United States*, 323 U.S. 454, 456-57 (1945); *Postal Telegraph-Cable Co. v. City of Newport*, 247 U.S. 464, 474 (1918). And in the modern era of notice pleading, it becomes particularly appropriate to insist that the defendant's answer, if its assumed truth is to be turned into the basis for an adverse judgment on the merits, must be unequivocal in its admission of all material allegations of fact. Any more lax or imprudent standard for use of this summary procedure would violate "the policy in favor of ensuring to each litigant a full and fair hearing on the merits of his claim or defense." 5 C. Wright and A. Miller, *Federal Practice and Procedure*, §1368 at 690 (1969).

Suffice it to say at this juncture that the plaintiff States have simply not addressed their burden of proving their entitlement to

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[10]See Moore, "Expropriation of the Texas *"Tidelands"* by Judicial Fiat," 3 Baylor L.Rev. 130, 147 (1951).

a judgment under Rule 12(c). They have yet to point to a single material fact alleged in the complaint that the answer of the State of Louisiana admits or fails to deny. Neither this Court nor the Special Master has been advised by the plaintiffs what facts have been alleged *in the complaint* that Louisiana has admitted *in its answer* that are material and decisive in terms of the constitutional issues at stake. All that the plaintiffs have contributed on this point to date is the following statement in their original motion for judgment on the pleadings (at 39-40):

> It is true that the answer of the defendant State of Louisiana contains pro forma denials or contradictions of material allegations of the complaint and that it asserts that "many factual controversies have been raised by the pleadings." Answer ¶ LXX. None of these mock denials, contradictions, or assertions, however, prevents the entry of judgment on the pleadings because it is obvious that all of the facts material to the determination of this controversy in its present posture have been admitted by Louisiana in its answer, already found authoritatively by this Court, or are otherwise subject to its judicial notice ... [citing authorities relative to the use of judicial notice on motions for judgment on the pleadings] .... Thus, although judgment on the pleadings is not appropriate if a material issue of fact exists, federal courts "have been firm in requiring that the issues be genuine and not based on mere pro forma denials or sham or patently false assertions in the pleadings." 5 C. Wright and A. Miller, Federal Practice and Procedure: Civil §1368, at 696 (1969).

Aside from its perjorative nature, the position of the plaintiff States appears to be that a judgment on the pleadings can be had by reference solely to matters outside the pleadings, as to which the defendant has no opportunity to admit or deny in the answer. But judgment pursuant to Rule 12(c), as noted above by Professors Wright and Miller, "can be achieved by *focusing on the content of the pleadings* and any facts of which the court may take judicial notice ... [and] only has utility when all material allegations of fact *are admitted in the pleadings* and only questions of law remain" (emphasis added). See page 16, *supra*.

The plaintiffs' theory of a Rule 12(c) judgment would shift the focus of the search for admissions of material allegations of fact from the pleadings to three outside factors: (a) the facial wording of the statutes involved; (b) facts and other matters of judicial notice or common knowledge; and (c) facts or other matters that have "already [been] found authoritatively by this Court." A defendant intent on denying all material fact allegations that the plaintiff might pluck from the bottomless fount of common knowledge, to say nothing of the bounty of authoritative decisions by this Court, would indeed face a Sisyphean task. It would be a task not unlike that faced by the State of Louisiana in being told by the plaintiff States that it has in effect admitted all conceivable readings of the First Use Tax statute that would render it invalid, all facts of judicial notice and common knowledge that would support a finding of invalidity, and all readings and interpretations of prior precedents that support the plaintiffs' versions of constitutional facts concerning transmission of natural gas.

Not unsurprisingly, use of such an unprincipled and un-limited structuring of a Rule 12(c) motion finds no recorded precedent in federal practice. Rarely can a judgment be entered solely on the basis of undeniable facts of judicial or common knowledge, with or without supporting "authoritative" judicial precedents.[11] But if such situations be possible, major constitutional adjudication is not one of them. Constitutional issues of high public importance should not and dare not be resolved in the cavalier manner suggested by the plaintiff States' motion, or in accordance with what the Special Master described as "a generous application of

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[11]The plaintiff States at no time have indicated or specified the facts as to which judicial notice should be taken in this case. Cf. Rule 201(e) of the Federal Rules of Evidence, entitling the adverse party to an opportunity to be heard, upon timely request, "as to the propriety of taking judicial notice and the tenor of the material noticed."

This Court has warned that the doctrine of judicial notice must not be turned "into a pretext for dispensing with a trial." *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 302 (1937); *Garner v. Louisiana*, 368 U.S. 157, 173 (1961). See also 9 Wigmore on Evidence, §2567 (3d ed. 1940).

judicial notice." Second Report of the Special Master, at 21.

Indeed, it is questionable whether even a properly conceived Rule 12(c) motion, focused primarily on the pleadings, is an appropriate vehicle for assessing issues of great economic importance, particularly those of constitutional dimensions. This Court has recognized that summary-type judgments are seldom proper in cases involving large public concerns.

> Judgments on issues of public moment based on such evidence [affidavits], not subject to probing by judges and opposing counsel, is apt to be treacherous. Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, through use of a declaratory summary judgment.
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> *Eccles v. Peoples Bank*,
> 333 U.S. 426, 434 (1948)

These sentiments were repeated in *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948), a case dealing with an attempt by summary judgment motion to secure a determination that the parties were not covered by the Fair Labor Standards Act. In rejecting that attempt and in requiring that a full factual record be developed, the Court observed that "summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice." 334 U.S. at 256-57.[12]

When the "issues of public moment" spring from a State's economic legislation, such as a tax, on what the State conceives to be a local "use" or incident having a significant nexus with its public concerns, two evidentiary principles control, especially in Commerce Clause litigation. First, there is a basic presumption

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[12]The Court also observed in *Kennedy* that, as is true here, the case came to it with a "welter of new contentions and statutory provisions" and with "a score of technical contracts" to be picked through, all without the Court's "full background knowledge of the dealings of the parties." 334 U.S. at 256.

of the "existence of factual conditions" supporting the constitutionality of the state legislation. *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209 (1934). Secondly, the burden of overcoming that presumption rests upon those who would challenge the constitutionality, necessitating proof that there is no state of facts possible that would sustain the legislation. *Id.*[13] See also *Southern Pacific R.R. Co. v. Arizona*, 325 U.S. 761 (1945); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978).

Supremacy Clause assaults on state legislation may also have critical factual predicates to prove or disprove. In determining what is federally supreme to a given state statute, there is "no one crystal clear distinctly marked formula ... [and] [o]ur primary function is to determine whether, *under the circumstances of this particular case*, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (emphasis added); see also *Florida Avocado Growers v. Paul*, 373 U.S. 132, 141 (1963). Such particular circumstances, in other words, may involve something more than merely reading and comparing the words of the federal and state statutes. They may well involve-as they do in this case-an examination of the factual circumstances bearing upon "the relationship between the state and federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977).

It would seem, then, that a Rule 12(c) motion is a particularly inappropriate way of determining whether the presumptively valid Louisiana First Use Tax can be invalidated. In its answer, Louisiana has denied every factual allegation in the complaint having any conceivable relation to the claim that the tax is un-

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[13]In the *Borden's Farm Products* case, the Court remanded the case for the taking of evidence as to the economic conditions and trade practices underlying the New York Milk Control Law. 293 U.S. at 213.

See generally Note, "The Role of Constitutional Facts in Commerce Clause Litigation," 65 Iowa L.Rev. 1053 (1980).

constitutional. It has denied every conclusory allegation that the statute on its face, as written or applied, is unconstitutional either under the Commerce Clause or the Supremacy Clause. In other words, the State of Louisiana has taken every step possible-in its pleadings and in its briefs-to preserve its right to establish the "existence of factual conditions" underlying the validity of the First Use Tax, and to preserve its right to defend by facts and arguments its presumptively valid tax statute against the factual, legal and constitutional assaults leveled against it.

In that highly controverted state of the pleadings, it becomes inappropriate to assess the presumptive validity or the claimed invalidity of the tax statute from the pleadings alone, even adding a generous amount of judicial notice. A Rule 12(c) motion forces judge and counsel to abandon the adversarial search and development of the facts necessary to constitutional adjudication of modern economic legislation. The motion forces the adjudicator to find the essential constitutional facts, which are rarely alleged or admitted in the current practice of notice pleading, in sources outside the pleadings. The defendant's admissions of material allegations of fact, the procedural heart of a Rule 12(c) motion, must then be said to flow from the undeniable wording of the statutes involved, the undeniable matters of judicial and common knowledge, and the undeniable fact-findings made in earlier precedents in other contexts.

A Rule 12 (c) motion, in short, forces constitutional adjudication to become a exercise in non-adjudicative and non-evidentiary fact finding, at least where the material facts cannot be distilled from the pleadings.[14]

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[14]The very fact that the plaintiffs seek judgment on the alleged facial invalidity of the First Use Tax statute illustrates how remote they are from developing any adjudicative or constitutional facts in this case. They are relying, rather, upon legislative or non-evidentiary facts to prove that the statute violates both the Supremacy Clause and the Commerce Clause. Legislative facts are those that have relevance to legal reasoning and the lawmaking process, whether in the reading of the face of statutes, or in the formulation of legal principles, or in the rendition of rulings from sources of judicial knowledge, or in the enactment of legislation. See Davis, "An Approach to Problems of Evidence in the Administrative Process," 55 Harv.L.Rev. 364, 404-07 (1942); K. Davis, 2 Administrative Law Treatise §§3-8 (1979).

The Special Master tried valiantly to confine his recommendations within the evidentiary straitjacket of the Rule 12(c) motion. He found that "the facts disclosed in the complaint and answer do not, without more, require that the [Louisiana] act be invalidated on the basis of the Supremacy Clause." Second Report of the Special Master, at 21. And with respect to his recommended denial of the Rule 12(c) motion on the Commerce Clause claim, the Special Master relied heavily on the admonition in *Nippert v. Richmond*, 327 U.S. 416, 431 (1946), that state tax statutes are not to be assessed in a vacuum, that the statute's "practical consequences for the doing of interstate business in applications to concrete facts are our concern." Second Report of the Special Master, at 37. The Special Master seemingly implied that there were sufficient disputes over material facts concerning the application of the Louisiana First Use Tax in the Commerce Clause context to warrant denial of the Rule 12(c) motion. Within the limited framework of that rule, the Special Master's conclusions as to factual disputes in the pleadings are eminently correct.

But the Special Master, in recommending denial of the motion, was correct for an even more fundamental reason. A judgment as to the constitutional validity of a complex economic or tax statute, enacted by a sovereign State, should not be entered without a fuller development of facts than a Rule 12(c) motion normally allows. The development and the determination of adjudicative facts, subject to cross-examination, are the stuff of which constitutional adjudication is made.

This Court has quoted with approval a leading commentator's statement that Commerce Clause adjudication, like many other fields of constitutional litigation, depends in large part "upon the thoroughness with which lawyers perform their task in the conduct of constitutional litigation," and that constitutionality "is conditioned upon the facts, and to the lawyers the courts are entitled to look for garnering and presenting the facts." *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. at 447

n.25.[15] The problem in this case is that a Rule 12(c) motion for judgment on the pleadings seems designed to inhibit rather than promote the development of facts so essential to constitutional adjudication. That alone mandates acceptance of the Special Master's recommendation that the Rule 12(c) motion be denied.

B. Impropriety of the motion in original actions

There is still another reason why the plaintiffs' motion for judgment on the pleadings should be denied. The inadequacy of a Rule 12(c) motion in promoting the development of facts in constitutional adjudication before any court is evident enough. But the inadequacy and indeed the impropriety of using that kind of a motion to settle constitutional controversies between sovereign States, in the setting of this Court's original jurisidiction, exceed all tolerable limits. Cf. Supreme Court Rule 9.2.

It has long been recognized that the Court "in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts." *United States v. Texas*, 339 U.S. 707, 715 (1950), and cases cited.

The principles of liberality in fact development in original proceedings have long been applied. Thus in the interstate stream controversy in *Kansas v. Colorado*, 185 U.S. 125, 147 (1902), the Court ruled that it would not "proceed on the mere technical admissions made by the demurrer," but would overrule the demurrer so that the case could go to issue and proof before final decision. Said the Court at 145:

> The general rule is that the truth of material and relevant matters set forth with requisite precision are admitted by

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[15]The statement quoted by the Court was that of Professor Dowling, "Interstate Commerce and State Power," 27 Va.L.Rev. 1, 27-28 (1940). See also Note, "The Role of Constitutional Facts in Commerce Clause Litigation," 65 Iowa L.Rev. 1053 (1980).

> demurrer, but in a case of this magnitude, involving questions of so grave and far-reaching importance, it does not seem to us wise to apply that rule, and we must decline to do so.

And in such boundary dispute cases as *Rhode Island v. Massachusetts*, 14 Peters (39 U.S.) 210, 257 (1840), and *Iowa v. Illinois*, 151 U.S. 238, 242 (1894), the Court also allowed the States great liberality in developing adjudicative facts, eschewing reliance on summary procedures and technical principles of pleadings. See also *United States v. Texas*, 143 U.S. 216 (1891), *United States v. Texas*, 162 U.S. 1 (1896); *United States v. Utah*, 283 U.S. 64 (1931); *United States v. Oregon*, 295 U.S. 1 (1935); *United States v. Wyoming*, 331 U.S. 440 (1947).

In other types of controversies between States, not involving boundaries or streams, the Court has been equally liberal in allowing full evidentiary development of each State's position. As was said in *Virginia v. West Virginia*, 234 U.S. 117, 121 (1914), where one State was alleged to owe a debt to the other:

> As we have pointed out, in acting in this case from first to last the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between states, involving grave questions of public law, determinable by this court under the exceptional grant of power conferred upon it by the Constitution, has been the guide by which every step and every conclusion hitherto expressed has been controlled. And we are of the opinion that this guiding principle should not now be lost sight of, to the end that when the case comes ultimately to be finally and irrevocably disposed of, as come ultimately it must, in the absence of agreement between the parties, there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice, after the amplest opportunity to be heard, has in any degree entered into the disposition of the case. This conclusion, which we think is required by the duty owed to the moving state, also in our opinion operates no injustice to the opposing state, since it but affords an additional opportunity to guard against the possibility of error, and thus reach the result most consonant with the honor and dignity of both parties to the controversy.

It is by now abundantly clear that the instant original proceeding, if it is to go forward to judgment on the ultimate constitutional issues, must be grounded on the full evidentiary hearing that the Special Master has recommended. This original suit is highly unique and important. For the first time in history a sovereign State's tax statute has been called into constitutional question by invoking the delicate and grave original jurisdiction of this Court. All parties are agreed that the constitutional questions thereby raised under the Supremacy Clause and the Commerce Clause are of vast public importance. In such a case, the defendant State of Louisiana is entitled to the benefit of the liberal factual development concept historically accorded by this Court in original proceedings.

Superimposed on any such evidentiary hearing in this proceeding, however, are the almost insuperable problems arising from the absence of any authoritative construction or interpretation of the Louisiana First Use Tax statute by the state courts. Those problems can best be met, of course, by dismissing these original proceedings and allowing the state courts to provide the necessary authoritative gloss in the pending tax refund suits, as urged in Louisiana's motion to dismiss. But if an evidentiary hearing before the Special Master is to be the fate of this case, the State of Louisiana suggests that the Special Master and the parties be given some guidance from this Court as to how these unique problems of statutory construction, interpretation and application are to be developed and resolved.[16]

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[16]The plaintiffs have made preliminary forays into some of the problems of the intent and motivation of the Louisiana legislature in enacting the First Use Tax statute. See brief in support of plaintiff States' exceptions at 8-12, quoting from excerpts of some of the Louisiana legislative hearings; and see appendix to that brief, reproducing a newspaper account of remarks supposedly made to reporters by certain Louisiana state officials.

As to the hazardous value of such purported legislative motivation, see *United States v. O'Brien*, 391 U.S. 367, 382-86 (1968); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 586 (1937) ("Motives alone will seldom, if ever, invalidate a tax that apart from its motives would be recognized as lawful.")

The problem in this case is not quite the same as the Court faced in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), which in no event stands as a precedent for dispensing with an evidentiary hearing in original cases involving the interpretation and application of state statutes. In that case, following extensive evidentiary hearings before a Commissioner appointed by the Court (252 U.S. 563), the Court invalidated a West Virginia statute that on its face proscribed all interstate transmission of natural gas produced in West Virginia. The West Virginia statute came before this Court on an emergency motion before the statute came into effect. It needed no authoritative interpretation or construction by state courts, however, because its prohibitory language and intent were considered clear. Yet in explaining and interpreting the statute, the Court made extensive reference to the facts developed at the evidentiary hearings. See 262 U.S. at 586-95.

In contrast, we are dealing here with complex, difficult and often ambiguous language in a state tax statute. The scope and purpose of that language are not totally clear on the face of the Louisiana law. Whereas the Commerce Clause implications of West Virginia's total ban on interstate transmission of gas could be easily and quickly assessed by this Court, thanks to a 2,000 page factual record, the Commerce and Supremacy Clause implications of Louisiana's complex tax statute cannot be assessed even with a factual record until there has been an authoritative construction by the state courts. Only those courts, of course, can provide such a construction.

The ultimate question thus is: In the context of an original proceeding before this Court, how can the necessary authoritative construction of a state tax statute be developed or acquired? What procedures are available, in any evidentiary hearing before the Special Master, for the parties to secure or develop the meaningful interpretation of the Louisiana First Use Tax statute that only the Louisiana state courts can provide?

As explained in Parts III and IV of this brief, the absence of

any authoritative construction of the Louisiana statute makes it difficult, if not impossible, for the parties to develop constitutional facts relevant to such construction or to develop constitutional theories and arguments relevant to such construction. All that the State of Louisiana can do at this juncture, therefore, is to suggest (1) the nature and scope of the facts it thinks might be appropriate and necessary in justification of its First Use Tax; and (2) the nature and scope of the constitutional arguments that could be made once some kind of an authoritative construction of the statute has been forthcoming.

III.

AN EVIDENTIARY HEARING MUST PRECEDE DETERMINATION OF THE CONSTITUTIONAL VALIDITY OF THE LOUISIANA FIRST USE TAX

The Special Master is correct in his assessment that the ultimate constitutional issues at stake should be addressed only "on the basis of a complete record." Second Report at 31. Evidentiary hearings, as he states, are necessary to determine if the Louisiana First Use Tax is being interpreted, operated and applied so as to create an irreconcilable conflict with the federal natural gas statutes. Second Report at 21.

And, with reference to the Commerce Clause issues, the Special Master observes that "it would be obviously advantageous to permit the parties to support their divergent positions by evidence relevant to the interpretation and administration of the law, the physical features of the entire process, and the economic impacts on and adjustment by buyers and sellers and consumers." Second Report at 37-38.

At the request of the Special Master, the State of Louisiana submitted a Proffer of Proof of the facts and circumstances it deems essential to its constitutional defense of the First Use Tax. For the convenience of the Court, that Proffer of Proof is reproduced in the appendix to this brief. And for the further

convenience of the Court, a summary of that Proffer of Proof is herewith provided.

The statements made in the Proffer and in the summary are not designed to reflect only what is uncontested or conceded. Many are mere allegations, awaiting proof at an evidentiary hearing. But the statements do indicate the massiveness and the complexity of the facts underlying this particular Supremacy Clause and Commerce Clause adjudication. And they indicate anew the wisdom of this Court's precept that, in controversies between States, a "full development of the facts" is most appropriate in resolving "issues of high public importance." *United States v. Texas*, 339 U.S. 707, 715 (1950).

Summary of Constitutional and Statutory Facts to be Submitted by the State of Louisiana

(1) The relevant factual-constitutional underpinnings of the Louisiana First Use Tax begin on the federal enclave known as the Outer Continental Shelf (OCS), lying underwater three miles or more off the Louisiana shoreline. The Federal Government, as owner of the OCS, from time to time executes leases that grant the so-called producers the right to explore for and extract natural resources from the OSC. Offshore wells are drilled into the OCS.

(2) If natural gas is discovered in quantities sufficient to justify commercial production, the producer-lessee enters into a gas purchase contract with a pipeline company.

(3) It is not clear precisely what gas commodity is sold by the producer to the pipeline company at the OCS wellhead. The gas purchase contracts are not in evidence and have not been otherwise revealed to Louisiana. Many of the contracts, particularly those executed prior to the enactment of the Louisiana First Use Tax, may well reveal that the product purchased by the pipeline company at the OCS wellhead is not the "raw gas" extracted through the well but rather the marketable "refined gas." Raw

gas, commonly known as "natural gas" by consumers, is processed or refined only after it has been transported by pipelines from the OCS wellheads to various refining or processing plants within Louisiana. Thus, if the purchase contracts relate only to processed natural gas, delivery of such gas to the pipeline purchasers can occur only at the termination of the processing in the plants located within Louisiana — known as the "tailgate" of the plants. In that event, full payment to the producer-seller for the purchased processed gas depends upon the volume of refined gas metered and delivered at the tailgates, unless otherwise provided in the contracts.

(4) The volume of OCS gas delivered at the tailgates in Louisiana, ready for interstate shipment to consumers, constitutes about 95% of the volume of raw gas produced on the OCS. The remaining 5% is removed from the raw gas, at the Louisiana processing plants, in the form of liquefiable hydrocarbons and waste products.

(5) The consideration paid by the pipeline-purchaser for the delivered commodity is at a price approved by the Federal Energy Regulatory Commission (FERC), acting under the terms of the Natural Gas Act, the Natural Gas Policy Act and the applicable regulations thereunder.

(6) The commodity purchased by the pipeline companies is dedicated to interstate commerce by virtue of its origin on the OCS, albeit in globo with other definable commodities. However, until this commodity, i.e., an MCF of gas containing one million BTUs and no corrosives, is deliverable and delivered, the terms of the contract are not met. Not until those delivery terms have been met can the marketing and initial distribution of the purchased commodity commence.

(7) Prior to receipt of the merchantable gas at the tailgate of the processing plant by the pipeline-purchaser, various activities or "uses" occur without which events there would be no delivery of pipeline quality gas useable as a fuel. A review of the historical evolution of the natural gas industry will demonstrate that these activities and uses are necessary steps in the manufacture of the

fuel known as natural gas. These activities have long been pursued by or on behalf of the owners of the natural gas.

(8) Producers cause unprocessed hydrocarbons to rise to the surface of the wellhead of the drilling platforms on the OCS. At this point these natural resources — unprocessed hydrocarbons — are captured and ownership and possession attaches. These unprocessed hydrocarbons are not in a standard marketable condition at this time.

(9) There are approximately 13,500 producing gas wells off the coast of Louisiana.

(10) The producers purport to sell these unprocessed hydrocarbons to pipeline companies, per contracts, where ownership and possession are alleged to attach at the wellheads. Before these unprocessed hydrocarbons are placed in the transmission lines (regulated as common carriers) they are passed through a separator to remove some of the waste products (salt water) brought to the surface with the unprocessed hydrocarbons.

(11) The pipeline companies bring these unprocessed hydrocarbons to the shores of Louisiana by means of underwater pipelines. Approximately 9,650 miles of such underwater pipelines connect these 13,500 wells to the 124 processing plants located in Louisiana. See second Report of the Special Master at 5 n. 7. This massive underwater gathering system crosses the wandering and vulnerable shorelines of Louisiana, causing massive environmental impact.

(12) Channels must be dredged through the fragile barrier islands protecting the sensitive shores of Louisiana to allow this gathering system to reach the processing plants. Upon reaching the coastline of Louisiana additional channels must be dredged through the marshes, swamps and waterbottoms of Louisiana to allow this pipeline gathering system to reach the processing plants.

(13) When the unprocessed hydrocarbons reach the Louisiana coastline it is passed through a gravity separator so as to remove

additional waste products, i.e., water and corrosives. The unprocessed hydrocarbons are then transmitted in the gathering system to a processing plant. At the entrance of the processing plant the unprocessed hydrocarbons are again passed through a separator to remove the remaining waste products. These waste products (water, corrosives and other impurities) cannot be run through the processing plant with the unprocessed hydrocarbons or extensive damage to the plant equipment will occur.

(14) Each of the 124 processing plants in Louisiana occupies approximately 75 acres, with a construction cost of approximately $40,000,000. "[T]he processing of the gas at this central gathering plant is necessary to remove hydrocarbons, hydrogen sulfide and other foreign elements *in order to permit its use as fuel.*"[17] Additionally, unprocessed hydrocarbons are subjected to extensive processing, refinement, treating, dehydration, compression and change in form and content to make the end product economically transportable over long distances under applicable rate structure, and to enable the pipeline owners to receive only that standardized portion of the BTU content of the unprocessed hydrocarbons to which their purchase contract entitles them and the federal rate and regulatory structure requires for delivery to gas consumers.

(15) The unprocessed hydrocarbons from the OCS cannot be transported in its original state to the ultimate consumer at the present price fixed in the rate structure of the pipeline owners by FERC. That is so because the additional weight and corrosive characteristics of the original stream would require that vastly greater costs be either absorbed by the pipeline companies or passed on to the beneficial users to recompense the pipeline companies for the additional BTUs, compression, line maintenance and other costs which would be increased.

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[17] *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 692 (1954) (dissenting opinion by Justice Clark) (emphasis supplied).

(16) At the Louisiana processing plants the unprocessed hydrocarbons are subjected to changes in temperature, pressure, form, content, value, molecular ratios and potential use. Thereafter, by a series of temperature changes, pressure changes, and the application of other products and chemicals, the constituent chemical makeup and BTU content of the gas are drastically altered from its original form. Propane is removed, butane is taken out and ethane is extracted. The gas is enveloped by a varsol oil solution from which it is again cleansed, refined, pressure changed and warmed to normal temperatures.

> While [processing] and transmission are substantially instantaneous, they are, we are convinced, essentially separable and distinct operations. The fact that to ordinary observation there is no appreciable lapse of time between the [processing] of the product and its transmission does not forbid the conclusion that they are, nevertheless, successive and not simultaneous acts.
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> *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 179 (1932)

(17) The components thereby removed are distributed to other points both within and without Louisiana for various commercial purposes. The remaining gas, which is then nearly pure methane, consisting at this point of approximately one million BTUs per thousand cubic feet, is delivered to the pipeline owners at the tailgate of the processing plant. There it is metered, paid for and transported interstate for distribution to ultimate consumers. The pipeline purchase contracts provide only for the payment and receipt of gas with a certain BTU content. Gas deviating from that content would be unusable by the ultimate consumers.

(18) The processing incident itself, which occurs solely within Louisiana, can only be performed once. It is not subject to repetitive performance in the several States through which the processed gas passes enroute to its ultimate consumption. Once the water and the impurities have been removed, once the

butane has been extracted and the propane and the ethane taken out, the gas may not again be subjected to those extractable uses. The gas, in other words, has been reduced to the standardized energy product which the consumers of the plaintiff States are equipped to use.

(19) The interstate movement or transportation of this processed fuel, known as natural gas, thus arguably commences at the tailgate of the processing plant. The pipeline company then transports the natural gas to a local distribution system in a sister state. The local distribution company in turn transports the gas, by virtue of retail sales, to the beneficial users of the gas. These processed hydrocarbons (natural gas) are not the same product produced at the wellhead on the OCS. Rather they are a product significantly altered in chemical content and therefore in marketability by the processing and refining "uses" or incidents that take place in Louisiana. In Louisiana's view, for purposes of assessing the validity of the First Use Tax in light of the negative implications of the Commerce Clause, the critical interstate movement commences only when the gas leaves the tailgates of the Louisiana processing plants in its altered or processed condition. The treatment accorded the unprocessed gas while in Louisiana takes place before that interstate movement begins.

(20) For this fuel (natural gas) to be furnished to local consumers in Louisiana, the owner of the natural gas produced from the OCS — an interstate pipeline company — must first obtain a certificate of public convenience and necessity from FERC. Such certificates have routinely been denied by FERC and, as such, approximately 98% of the natural gas placed in interstate commerce at the tailgate of the processing plants in Louisiana is transported out of the State of Louisiana. Although Louisiana consumers are prohibited from acquiring the bulk of the natural gas in question, to the extent that such gas is consumed in Louisiana the purchaser of the gas pays the First Use Tax as passed on to him from the pipeline company-seller.

These are some but by no means all the facts that the State of Louisiana would want to submit at any evidentiary hearing. On-

ly out of that amalgam of facts, supplemented by what the other parties would doubtless want to submit, could Louisiana even begin to construct a meaningful constitutional defense of the First Use Tax statute. Until such facts have been developed, until there has been some authoritative construction of the Louisiana statute, adjudication of the constitutional implications of the statute cannot proceed.

IV.

A JUDGMENT ON THE CONSTITUTIONAL ISSUES IS IN NO EVENT WARRANTED ON THE PRESENT PLEADINGS

For various good and sufficient reasons, the Special Master has declined to reach and consider the ultimate constitutional conclusions sought by the complaint of the plaintiff States. He has recommended that an evidentiary hearing be held before the Supremacy Clause and Commerce Clause claims can be properly resolved.

Nevertheless, the plaintiff States by their exceptions and supporting brief continue to press their constitutional contentions upon this Court as if the pleadings alone make those contentions ripe for final adjudication. The United States and the seventeen pipeline companies eagerly support the plaintiff States in this rush for a summary declaration by this Court that the Louisiana First Use Tax statute is invalid, thus entitling the pipeline companies to a refund of the taxes paid under protest.

The State of Louisiana, supported to a large extent by the second Report of the Special Master, has presented a host of reasons and considerations why this case is simply not ripe or appropriate for immediate, summary and final constitutional adjudication. Not the least of the reasons is the absence of any authoritative delineation of the meaning or scope of the First Use Tax statute by the Louisiana courts. Until that problem is

solved, neither the Special Master nor the parties can hope to define the specific provisions of the Louisiana tax statute that the complaint brings into constitutional issue. Nor can they develop or assess the supporting constitutional facts.

Given such an inadequate state of the pleadings and the record, the State of Louisiana still feels obliged to provide this Court some idea of the constitutional arguments that it could or would make when the issues are properly defined and refined. Most of these arguments are diametrically opposed to those set forth in the present exceptions and supporting brief of the plaintiff States. Some of Louisiana's potential contentions are fairly summarized in Part II of the Special Master's Report of September 15, 1980, at 20 - 38. A fuller summary of such contentions is set forth in Parts III and IV of Louisiana's Brief in Response to Brief for the United States and the Federal Energy Regulatory Commission as *amici curiae*, at 15 - 36 (filed on December 5, 1979) (gray cover).

The State of Louisiana does not desire to burden the Court with a repetition of all the potential or possible contentions that are contained in the aforementioned brief of December 5th, 1979. What follows is merely an elaboration of those contentions that is necessitated by some of the remarks in the Special Master's Second Report and in the latest briefs of the plaintiff States and other entities that support the motion for judgment on the pleadings. These matters are discussed herein in the same order as in Louisiana's earlier brief.

A. The alleged violations of the Commerce Clause

(1) The "flat prohibition" argument

The latest brief of the Solicitor General, redesignated as an *amici* brief rather than one in support of an Exception, repeats at page 14 the statement in his earlier *amici* brief (at p. 44) that the Commerce Clause "flatly prohibits state taxation of goods that are merely in transit through the state when the tax is assess-

ed," citing *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954). While the plaintiff States appear to have abandoned this "flat prohibition" argument in their latest brief (see Part II of their brief in support of exceptions), the Special Master also refers to the *Michigan-Wisconsin* decision as "the case which on its facts is closest to this one" and as a case holding that "taking" gas from the outlets of a scrubbing plant "was not a local event separable from the interstate transportation." Second Report of the Special Master, at 36.

It, therefore, bears emphasis here that the *Michigan-Wisconsin* decision is not precedent for holding that, for purposes of state taxation, there can be no local and taxable events separable from the flow of natural gas from wellhead to burners. As carefully noted by the Court in that case, 347 U.S. at 166-67:

> [I]t is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it. [Citations omitted] And if a genuine separation of the taxed local activity from the interstate process is impossible, it is more likely that other states through which the commerce passes or into which it flows can with equal right impose a similar levy on the goods, with the net effect of prejudicing or unduly burdening commerce.
>
> The problem in this case is not whether the State could tax the actual gathering of all gas whether transmitted in interstate commerce or not, cf. Hope Natural Gas Co. v. Hall, [274 U.S. 284 (1927)], but whether here the State has delayed the incidence of the tax beyond the step where production and processing have ceased and transmission in interstate commerce has begun. Cf. Utah Power & Light Co. v. Pfost, [286 U.S. 165 (1930)]. The incidence of the tax here at issue, as stated by the Texas appellate court, is appellants' "taking" of gas from Phillips' gasoline plant. This event, as stipulated, occurs after the gas has been produced, gathered and processed by others than appellants. The "taking" into appellants' pipeline is solely for interstate transmission and the gas at that time is not only actually committed to but is moving in interstate commerce.

In other words, the Court in *Michigan-Wisconsin* conceived of the interstate flow of natural gas, from the standpoint of immunity from state taxes or controls, as commencing at the point where "production and processing have ceased" and continuing from the outlets or tailgates of the processing plant into the interstate pipelines. In that case, Texas impermissibly sought to tax the "taking" of the processed gas after the processing had ceased and interstate transmission of the processed gas had begun. Likewise, if Louisiana were to impose its First Use Tax at the tailgate of the processing plant, the tax would not survive the *Michigan-Wisconsin* rationale. See also *United Fuel Gas Co. v. Hallanan*, 257 U.S. 277 (1921); *State Tax Commission v. Interstate Natural Gas Co.*, 284 U.S. 41 (1931).

But, as an evidentiary hearing will establish, the taxable incidents of Louisiana's First Use Tax all occur prior to the cessation of processing and before transmission of the processed gas in interstate commerce has begun. Thus the *Michigan-Wisconsin* decision clearly allows the imposition of the First Use Tax in the circumstances of this case. The Commerce Clause does not *per se* prohibit the taxing of the local incidents occurring in Louisiana before processing has been completed.

The *Michigan-Wisconsin* case also illustrates another constitutional concept fundamental to Louisiana's position in this case. There, as in this case, the Court was dealing with the local incidences associated with the interstate transmission of natural gas that can be taxed or regulated by state or local authorities. It was not dealing with the broad reach of federal authority, which may well extend from wellhead to burner. But, in defining the transmission that is immune from state taxes, the Court in *Michigan-Wisconsin* defined the transmission as limited to the transmission of processed gas, a transmission that commences at the tailgate of the processing plant.

For a definition of when this processed gas terminates its interstate journey, again for purposes of state taxation and regulation, one must turn to the Court's earlier decision in *East Ohio Gas Co. v. Tax Commission*, 283 U.S. 465, 471 (1931). The

Court there held that "the furnishing of [processed] gas to consumers of Ohio municipalities by means of [local] distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the state."

Thus this Court has conclusively established that it is only the interstate transmission of processed natural gas from processing plant to local distribution plant that is immune from state taxation and regulation. Given an opportunity to prove that its tax is imposed on local events preceding the commencement of such transmission of processed gas, Louisiana will be able to demonstrate that its First Use Tax is not "flatly prohibited" by the Commerce Clause.

(2) The Apportionment and Discrimination Arguments

The repeated attacks on the First Use Tax, in terms of the apportionment and discrimination concepts of the Commerce Clause, warrant further elaboration of the position of the State of Louisiana, again on the assumption that it will be given the chance to develop that position at an evidentiary hearing.

This Court has repeatedly held that state taxes affecting interstate commerce meet the requirements of the Commerce Clause if they: [1] "are applied to activity with a substantial nexus with the State," [2] "are fairly apportioned," [3] "do not discriminate against interstate commerce," and [4] "are fairly related to the services provided by the State." *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 750 (1978). See also *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 279 (1977). A state tax cannot be invalidated unless its opponents develop a "factual basis on which to declare the [state] tax unconstitutional as applied." 435 U.S. at 751. Each prong of the four-part test depends upon factual proof of the relevant economic realities. Since the overruling of *Spector Motor Service v. McLaughlin*, 323 U.S. 101 (1944) in *Complete Auto Transit*

Inc. v. Brady, 430 U.S. 274, 288-89, it is impossible to assess the validity of a state tax solely by examining the language used or not used by the legislative draftsmen. As *Complete Auto Transit* recognized, "[t]here is no economic consequence that follows necessarily from the use of the particular words ... and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect." 430 U.S. at 288.

As the Special Master recognized, the plaintiff States here suggest that the First Use Tax violates only the first and fourth of these criteria, thus apparently conceding that the tax is "applied to activity with a substantial nexus with the State" and is "fairly related to the services provided by the State." See Exceptions of the plaintiff States and brief in support of exceptions at page 27. That Louisiana meets these other two requirements is unquestioned. This Court has explained the nexus requirement as necessitating that there is "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *National Bellas Hess v. Illinois*, 386 U.S. 753, 756 (1967); *Miller Brothers Company v. Maryland*, 347 U.S. 340, 344-45 (1954). The nexus here is laid out at length in Louisiana's Proffer. See Proffer of Proof at A—29-36. That the tax is fairly related to services provided by the State is also clear from the Proffer of Proof.[18]

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[18]In his Report the Special Master noted Louisiana's Proffer of Proof that "there are 124 processing plants in Louisiana which process 95% of the outer continental shelf gas. A processing plant typically occupies about seventy-five acres of land and represents a present cost value of $40,000,000. Louisiana Proffer of Proof, A—10." Second Report of the Special Master, at 5 n.7. The Proffer also discusses in detail the types of governmental services Louisiana must provide because of the processing and transportation of natural gas from the Outer Continental Shelf. These include educational facilities, potable water supply, energy services, police and fire protection, health services, transportation facilities, recreational facilities, housing sanitary sewage and solid waste disposal, among others. See Proffer of Proof at A—37-42. The Proffer also documents in tragic detail the environmental consequences of the facilities needed to bring Outer Continental Shelf gas through Louisiana. Proffer of Proof at A—42-48.

The plaintiffs, however, do challenge the tax under the apportionment and discrimination requirements. These, however, cannot be viewed in isolation. The four factors laid out in the *Washington Stevedoring* case are sufficiently interrelated that the degree of compliance with one can affect compliance with the others. For example, the nexus of the tax activity with the taxing state can be so substantial that the activity does not occur anywhere else and thus cannot be taxed again by another state. If so, then there is no apportionment problem because the activity taxed occurs only once. Thus, a factual dispute about one of the factors renders unsuitable a judgment on the pleadings with respect to another of the factors.

To meet Commerce Clause requirements, a state tax must not discriminate against interstate commerce. The Special Master rejected the plaintiffs' contention that the Louisiana First Use Tax discriminated as a matter of law, holding that "it is hard to tell from the pleadings" whether discrimination exists and that the Louisiana tax could be "a 'compensating' tax intended to complement the State severance tax."[19]

In determining whether the Louisiana First Use Tax violates the discrimination prong of the Commerce Clause test, several principles, all enunciated by the Court in prior cases, must be kept in mind.

First, few if any state tax statutes are just alike; prior cases have at best limited usefulness in determining the validity of a tax:

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[19]While recognizing that the First Use Tax would violate the discrimination prong of the commerce clause test if it was "actually a production tax on offshore gas," one commentator also concludes that no violation exists: "Compensating use taxes are valid despite challenges based on discrimination. The Louisiana use tax eliminates some of the economic advantages once enjoyed by interstate concerns. Offshore producers, not liable for a use tax, now pay a use tax. The Louisiana tax, because it equalizes the treatment of intrastate and interstate producers, is valid." Note, "The Effect and Validity of State Taxation of Energy Resources", 58 Wash. U. L. Q. 345, 360-61 (1980).

> [T]he Court has counseled that the result [in interstate commerce challenges to state tax statutes] turns on the unique characteristics of the statute at issue and the particular circumstances in each case.
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> *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977)

Second, a state tax statute must be viewed in operation and should not be judged on its face:

> In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. (Best & Co. v. Maxwell, 311 U.S. 454, 455-56). This concern with the actuality of operation, a dominant theme running through all state taxation cases, extends to every aspect of the tax operations.
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> *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69 (1963)

See also *Nippert v. Richmond*, 327 U.S. 416 (1946); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 443-44 (1941).

Third, a state tax cannot be viewed in isolation from the other taxing statutes enacted by the state. Instead, the overall state taxing scheme must be evaluated in determining whether discrimination truly exists. As this Court held in a case involving the validity of another Louisiana tax statute,

> Considered in isolation, the Louisiana use tax is discriminatory; it was intended to apply primarily to goods acquired out-of-state and used in Louisiana. If it stood alone, it would be invalid. However, a proper analysis must take "the whole scheme of taxation into account." Galveston, H.&.S.A.R. Co. v. Texas, 210 US 217, 227, 52 L ed 1031, 1037, 28 S Ct 638; Gregg Dyeing Co. v. Query, 286 US 472, 479, 480, 76 L ed 1232, 1237, 1238, 52 S Ct 631, 84 ALR 831.
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> *Halliburton Oil Well Cementing Co. v. Reily*, 373 US 64, 69 (1963)

See also *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

Fourth, precise equality in taxation is unattainable; therefore, approximate equality is sufficient to uphold a statute:

> Absolute equality in taxation can never be attained. That system is the best which comes the nearest to it .... The object should be to place the burden so that it will bear as nearly as possible equally upon all.
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> *Tappan v. Merchants' National Bank*, 86 U.S. 189, 195 (1874).

See also *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707, 716-17 (1972); and *State Railroad Tax Cases*, 92 U.S. 575, 612-13 (1876).

Given these teachings, it is clear that a judgment on the pleadings is impermissible here. As the Special Master concluded, a determination whether there is discrimination against interstate commerce should await a factual hearing.

The plaintiff States, however, argue that a judgment on the pleadings is appropriate and that the Louisiana tax as a matter of law is discriminatory. Surprisingly, they cite this Court's statement in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288-89 n.15 (1977) that "[a] tailored tax, however, accomplished, must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce." Yet, in actuality, they oppose a "careful scrutiny" of the Louisiana tax. Instead of asking for a detailed hearing at which the details of the statute, its operation, and the relationship between it and other Louisiana tax statutes can be explored, they ask for a judgment based on the naked assertions found in the pleadings.

The plaintiff States assert that several types of discrimination warrant a judgment on the pleadings that this tax is unconstitutional:

(1) Initially they argue that the tax discriminates against gas imported from "sister state[s]." Exceptions of the plaintiff States and brief in support of exceptions, at 28. The plaintiff States have never alleged that any gas is in fact imported into Louisiana from other States. The normal movement of such gas is out of Louisiana into other States that have no natural gas. It is certainly unlikely that any of the plaintiff States are shipping

natural gas to Louisiana. Even if there is any gas imported from other States into Louisiana, any First Use Tax liability is offset by a credit based on the severance or production taxes levied by the producing State. Such a severance or production tax is customarily imposed.

(2) The plaintiff States also contend that the tax discriminates against gas imported from outside the United States. As Louisiana's answer makes clear, that gas is not subject to the tax. See Answer LIII - LVI.

(3) The plaintiff States next contend that the tax discriminates against Outer Continental Shelf gas and in favor of gas on which a severance tax is imposed. This supposed discrimination exists because a separate Louisiana statute grants a credit on a taxpayer's severance taxes to the extent the taxpayer pays the First Use Tax. As the Special Master recognized, the plaintiff States' assertion on this point cannot support a judgment on the pleadings: "[I]nstead of being discriminatory, the 'actuality of operation' may show that the [First Use [T]ax is a 'compensating' tax intended to complement the State severance tax as the use tax complemented the sales tax in *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937)." Second Report of the Special Master, at 35.

An actual determination whether any discrimination exists requires a careful look at Louisiana's whole taxing structure as well as at the actual effects of the First Use Tax. See, e.g., *Caskey Baking Co. v. Virginia*, 313 U.S. 117 (1941); *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 479-81, (1932); *General American Tank Car Corp v. Day*, 270 U.S. 367, 373 (1926); *Traveler's Insurance Co. v. Connecticut*, 185 U.S. 364, 369-70 (1902). Thus the equality or inequality of taxation cannot be measured at this time. Besides, the plaintiff States blithely and mistakenly cast this controversy into a *Louisiana v. The World* structure. In actuality, Louisiana residents who are the ultimate consumers of Outer Continental Shelf gas subject to the First Use Tax do pay the tax, just as non-Louisianians do. And non-Louisianians who are the ultimate consumers of gas subject to the Louisiana

severance tax do pay that tax, just as Louisiana residents do.[20] The plaintiff States' basic contention can be found on pp. 34-35 of their Exceptions to the Special Master's Report:

> *[O]ut-of-state consumers who receive no government services from Louisiana bear the brunt of the tax; people who receive Louisiana's government services pay no tax whatever.*
>
> (emphasis in original)

The import of their arguments is actually much different. What they really are saying is: Louisiana residents should pay for all of the additional government services required because of the transportation and processing of Outer Continental Shelf gas and should incur the loss of land and the harmful and often irreversible effects incurred by virtue of the gas; out-of-state consumers, many from States who steadfastly refuse to allow oil and gas production for fear of the same problems that plague Louisiana, should pay nothing whatsoever to alleviate the burdens suffered by Louisiana solely by virtue of the gas brought in from the Outer Continental Shelf.

The burdens suffered by Louisiana, as described in its Proffer of Proof, are indeed great. Louisiana must provide a wide variety of government services directly as a result of the existence of the facilities for processing and transporting the gas from the Outer Continental Shelf. See n.18, *supra*. Louisiana also will endure severe deleterious environmental effects. The intense channelization associated with Outer Continental Shelf gas marketing has impaired the natural functioning of barrier islands and their associated estuaries, which "form the most dynamic and complex physical/marine life system in the northern hemisphere." Proffer of Proof at A—43. Each year Louisiana loses approximately 16.5 square miles of land in its coastal zone. Proffer of Proof at A—44. And "recent studies of the Louisiana environmental zone indicate that, in general, canals and pipeline

[20]Of course, the ultimate consumers will bear the severance tax or First Use Tax only if the Federal Energy Regulatory Commission chooses to allow the pipeline companies to pass the tax on to them.

trenches have drastically increased rates of deterioration and may contribute to the eventual collapse of the estuarian systems along the Louisiana coast." Proffer of Proof at A—45. Channelization necessary for the transportation of Outer Continental Shelf gas also is causing destruction and loss of wetlands, swamps, and marshes, "creat[ing] an irreversible impact on Louisiana's irreplaceable resources," including fish and oysters. Proffer of Proof at A—45. Gas leaks, spills and blowouts can also cause severe damages. Proffer of Proof at A—47.

Finally, the plaintiff States complain about narrow exemptions such as those for production of sulphur, fertilizer and anhydrous ammonia. Again, the actual effects of these exemptions cannot be judged until a hearing is held at which the operation of the tax can be analyzed and its relationship with the rest of the state's taxing structure can be explored. At this point, it need only be said that this Court has long recognized that the States must be given wide latitude in constructing tax exemptions for certain industries or classes. See, e.g., *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972); *Independent Warehouses, Inc. v. Scheele*, 331 U.S. 70 (1947); *Hicklin v. Coney*, 290 U.S. 169 (1933); *Utah Power & Light Company v. Pfost*, 286 U.S. 165 (1932); *Bell's Gap R.R. Co. v. Pennsylvania*, 134 U.S. 232 (1889).

B. The alleged violations of the Supremacy Clause

The Special Master correctly summarized that the effect, if any, of the First Use Tax upon the "regulatory power of the FERC" cannot be ascertained upon the face of the pleadings or the statutes.[21] Such a determination can only be made after all the facts have been established. *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

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[21]Second Report of the Special Master, at 27, 30.

The plaintiff States assert that Section 1303 C [LSA R.S. 47:1303 C] "touches" the scheme of federal regulation and has a "possibility of being in conflict with the Natural Gas Act." Such peripheral interface between a federal statute and state statute is not violative of the Supremacy Clause. *Hines v. Davidowitz, supra.* The state statute must thwart the "full purpose and objectives" of the federal enactment before the Supremacy Clause comes into operation.

The United States and the Federal Energy Regulatory Commission advocate that "the Louisiana levy interferes with the federal regulation of the transportation and sale of gas in interstate commerce and is therefore invalid under the Supremacy Clause."[22] They further expound that "Section 47:1303 C impinges upon the Commission's ratemaking authority under Sections 4 and 5 of the Natural Gas Act (15 U.S.C. 717c and 717d)."[23] And, that "§47:1303 C interferes with the Commission's authority to allocate costs between gas consumers and the owners of liquid and liquefiable hydrocarbons which aer [*sic*] carried by interstate pipelines."[24]

(1) Section 1303 C

Section 1303 C of Title 47 of the Louisiana Revised Statutes of 1950, as amended by Act 293 of 1978, provides:

> In furtherance of the public policy and purpose set forth in Section 1301 of this part, and particularly Subsection C of said Section, this tax shall be deemed a cost associated with uses made by the owner in preparation [for] marketing of the natural gas. Any agreement or contract by which an owner of natural gas at the time a taxable use first occurs claims a right to reimbursement or refund of such taxes

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[22] *Amici* Brief filed November 14, 1980, at 21.

[23] *Amici* Brief filed November 14, 1980, at 22.

[24] *Amici* Brief filed November 14, 1980, at 23.

> from any other party in interest, other than a purchaser of such natural gas, is hereby declared to be against public policy and unenforceable to that extent. Notwithstanding any such agreement or contract, such an owner shall not have an enforceable right to any reimbursement or refund on the basis that this tax constitutes a cost incurred by such owner by virtue of the separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, or that this tax constitutes any other grounds for reimbursement or refund under such agreement or contract, unless there has been a final and unappealable judicial determination that such owner is entitled to such reimbursement or refund, notwithstanding the public policy and purpose of this part and the foregoing provisions of this Subsection C. In any legal action pursuant to this Subsection, the state shall be an indispensable party in interest.

The opponents contend that Section 1303 C of the First Use Tax statute is preempted by virtue of its conflict with the exclusive jurisdiction of the Commission. This position is taken in reliance upon alleged facts, i.e., the existence of contracts between the producers of natural gas and the natural gas companies which require the producers to bear all costs (including taxes) associated with the processing of the natural gas produced from locations on the Outer Continental Shelf. These facts are not established by the pleadings. The absence of such essential facts negates any possibility of the rendition of a judgment on the pleadings. In essence their position is that, when the First Use Tax declared unenforceable certain provisions that may be contained in some contracts or agreements authorizing the party liable for the First Use Tax to seek and obtain reimbursement of the tax from any party other than another purchaser, the State of Louisiana adopted a "regulation" conflicting with the exclusive jurisdiction of the Commission. Louisiana contends that is not and cannot be the case.

Section 1303 C provides that the contract agreement provision deemed to be unenforceable is only conclusively so in the event a final definitive judgment is rendered to that effect. There must be a showing that contracts or agreements were in existence con-

taining provisions declared to be "unenforceable" when the Act became effective, for Section 1303 C to have any effect. There has been no allegation or proof that any such contracts were in fact in existence.

If such contracts or agreements actually were in existence, they would be under the jurisdiction of the Commission as contracts forming the basis of certificates authorizing transportation services. The Commission may, pursuant to the procedures set forth in the Natural Gas Act, authorize the deletion of any such reimbursement provisions from contracts which are part of the certificates of public convenience and necessity. 15 U.S.C. §§717c (d) and (e), 717d (a).

Several options are available to those owner-taxpayers having a contractual or agreement right of reimbursement or refund from a party other than the purchaser of the gas. Such options are (1) to seek to enforce the contractual or agreement provisions; (2) to seek a judicial determination that the owner-taxpayer "is entitled to such reimbursement or refund;" or (3) to seek a modification, change or amendment to the contract in conformity with the statute. The first two options would necessitate judicial action while the third option would necessitate Commission authorization.

This third option apparently has been exercised by certain owner-taxpayer natural gas companies, for the Commission has deleted all such reimbursement or refund provisions from those contracts in connection with the certificates of public convenience and necessity.[25] Thus, there exists no actual or potential conflict between the First Use Tax, more particularly Section 1303 C, and the exclusive jurisdiction of the Commission.

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[25]See the Commission's Order No. 10, 43 Fed. Reg. 45553 (Oct. 3, 1978); Order No. 10-A, 43 Fed. Reg. 60438 (Dec. 28, 1978); Order No. 10-B, 43 Fed. Reg. 13460 (March 12, 1979), 44 Fed. Reg. 21330 (April 10, 1979) and 44 Fed. Reg. 46291 (Aug. 7, 1979).

Plaintiffs and the Commission proffer gratuitous and self-serving constructions of the First Use Tax in support of the contention that the Louisiana statute, particularly§1303 C, facially violates the Supremacy Clause interpretation by attempting to allocate among producers, pipelines and consumers the cost of transportation and sale of the affected natural gas.

The Commission's interpretation of the intent of §1303 C is made without any proof of the factual circumstances that gave rise to the language of this section. During legislative deliberation of the scope and application of the tax, interested parties expressed fear that, despite careful attempts to enumerate the uses to which the tax applied, some pipeline-purchasers might maintain that the tax was solely a processing tax. Their fear was that a processing tax might require the producers to bear all taxes and/or costs incurred, thereby entitling the pipeline-purchaser to withhold from the purchase price the cost of the tax it was otherwise liable for as the owner of the gas. By §1303 C the Louisiana legislature, as the evidence will show, sought only to make it clear that the First Use Tax is not a processing tax within the intendment of any such contract language, but rather was to have a much broader application as a cost associated with certain defined "uses" made by the owner of the gas in preparation for the ultimate marketing of the processed gas. The legislature even provided a mechanism by which the parties to such contracts could litigate the applicability and intent of such contract language as it might relate to the First Use Tax, in which instances the State would be a necessary party. The legislature made no attempt and indicated no intention, express or implied, direct or indirect, to allocate costs concerning the transportation and sale of natural gas in interstate commerce.

Throughout the legislative deliberations on the First Use Tax statute, as the evidence will show, it was recognized and acknowledged that the Federal Energy Regulatory Commission has the sole and exclusive right to determine whether the tax upon the enumerated uses constitutes a cost that could properly be passed to the beneficial users of the commodity. Indeed, though not then enacted, the language that ultimately became

§110 of the Natural Gas Policy Act (15 U.S.C. §3320) was referenced not only as proof of the Commission's jurisdiction, but also of the consistency of the levying of such a state tax with congressional intent.

The Commission in fact exercised its jurisdiction without hindrance in Orders 10, 10-A and 10-B.[26] If it now has misgivings about the wisdom of those Orders the original jurisdiction of this Court need not be invoked to resolve these doubts.

The United States and the Commission further assert that Section 1303 C prohibits the Commission from determining "[w]hether the producers or the pipelines' natural gas customers must bear the costs (including any taxes) incurred by the pipelines because of those activities."[27]

The Special Master found that "FERC has adopted regulations permitting the tax to be passed along, but making provision for refunds to the consumers if the tax is finally held invalid and mandating the pipelines to seek relief in the Louisiana courts. ... Meanwhile the FERC administrative proceedings are continuing with an order to show cause why the producers should not be billed for and pay the First Use Tax with respect to liquid and liquefiable hydrocarbons transported with or extracted from natural gas. FERC Order to Show Cause in R.M. 78-23."[28]

If the federal agency empowered to administer this federal statute has made no factual or legal finding contrary to the state enactment, then there can be no conflict within the meaning of the Supremacy Clause. No supremacy issue is involved until the federal enactment, as administered, purports to prohibit the enforcement of the state statute.

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[26]See the Commission's Order No. 10, 43 Fed. Reg. 45553 (Oct. 3, 1978); Order No. 10-A, 43 Fed. Reg. 60438 (Dec. 28, 1978); Order No. 10-B, 43 Fed. Reg. 13460 (March 12, 1979), 44 Fed. Reg. 21330 (April 10, 1979) and 44 Fed. Reg. 46291 (Aug. 7, 1979).

[27]*Amici* Brief filed November 14, 1980, at 26.

[28]Second Report of Special Master, at 28.

(2) Applicability of the NGA and NGPA

The Natural Gas Policy Act (§110)[29] reflects congressional anticipation of state enactment of taxes which may have an impact on the price of natural gas to be paid by the ultimate consumer. This Court has held that within the ratemaking authority of the Commission (Federal Power Commission then, and now the Federal Energy Regulatory Commission) taxes may be allowed as a cost of service in adjusting rates pertaining to the transportation and sale of natural gas.

> In our view what the Commission did here did not exceed the powers granted to it by Congress. One of its statutory duties is to determine just and reasonable rates which will be sufficient to permit the company to recover its costs of service and a reasonable return on its investment. Cost of service is therefore a major focus of inquiry. Normally included as a cost of service is a proper allowance for taxes, including federal income taxes. The determination of this allowance, as a general proposition, is obviously within the jurisdiction of the Commission. ...
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> *FPC v. United Gas Pipe Line Co.*,
> 386 U.S. 237, 243 (1967)

Section 110 (a) (1) of the NGPA (15 U.S.C. §3320 (a) (1)) provides that state severance taxes are to be allowed as an additional cost over the maximum lawful price for the first sale of natural gas. Further, Section 110 (a) (2) of this Act (15 U.S.C. §3320 (a) (2)) provides that the first sale price of natural gas may exceed the maximum lawful price "to the extent necessary to recover ... (2) any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission."

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[29] 15 U.S.C. §3320.

The Commission is thereby granted the discretionary authority to determine those costs of service incurred by the natural gas companies which may be passed on through rate charges[30] to the ultimate consumers of natural gas. This discretionary authority does not prohibit state taxation of local incidences, and more particularly, it does not prohibit the application of the First Use Tax to the various local uses of the natural gas within the State of Louisiana.

Each of the statutorily enumerated uses has occurred in Louisiana for many years prior to the enactment of the First Use Tax. The statute merely identifies those local uses as appropriate incidences of taxation. Each statutorily enumerated use (LSA-R.S. 47:1302 (8)) was and is occurring consistent with certificates of public convenience and necessity issued by the Commission under Section 7 of the Natural Gas Act.

To determine whether state action "invalidly invade[s] the federal agency's exclusive domain" (*Northern Natural Gas Co. v. State Corp. Comm'n)* under the Natural Gas Act, the standard is "whether state authority can practicably regulate a given area and, if we find that it cannot, then [the Court is] impelled to decide that federal authority governs." *FPC v. Transcontinental Gas Corp.*, 365 U.S. 1, 19-20 (1961).

This Court has consistently recognized that the "production or gathering" of natural gas is exempted from the federal regulatory domain by the terms of Section 1 (b) of the Natural Gas Act and that "production" and "gathering" are "terms narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Northern Natural Gas Co.*, and the cases cited therein, 372 U.S. 84, 90 (1963). "Natural gas" is not in a state suitable for marketing or distribution at the time of its production. Until (1) the central

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[30]The Commission may also deny the pass on of certain cost of services under its ratemaking jurisdiction. *FPC v. United States Gas Pipe Line Co.*, 386 U.S. 237 (1967).

gathering of the original gas stream is accomplished, and (2) the substantial chemical changes and refinement that occur at facilities and properties on shore are completed, and (3) the refined or processed gas reaches the "tailgate" or outlet of the gathering and processing plant for transmission, there can be no marketing or initial distribution thereof.[31]

The First Use Tax is imposed upon the following uses of natural gas in Louisiana: (1) sale; (2) the transportation in the state to the point of delivery at the inlet of any processing plant; (3) the transportation in the state of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; (4) transfer of possession or relinquishment of control at a delivery point in the state; (5) processing for the extraction of liquefiable component products or waste materials; (6) use in manufacturing; (7) treatment; and (8) other ascertainable action at a point within the state. LSA-R.S. 47:1302 (8). Louisiana is prepared to show that at least the first five uses enumerated are physical acts or activities necessary in preparing the natural gas "for its first state of distribution," (*Northern Natural Gas Co.*, and the cases cited therein, *id.*), and thus exempt from the federal regulatory scheme under Section 1 (b) of the Natural Gas Act. Since the activities or uses subject to taxation are not within the comprehensive federal regulatory scheme, it cannot be said that the First Use Tax "invalidly invade[s] the federal agency's exclusive domain." *Northern Natural Gas Co. v. State Corp. Comm'n, id.* Louisiana is thus prepared to show that the First Use Tax neither conflicts with nor is preempted by the authority of the Commission.

Furthermore, the First Use Tax does not mandate any action by natural gas companies as a result of the imposition of the tax, nor does the Louisiana tax attempt to regulate in any manner, directly or indirectly, the wholesale price of natural gas transported in interstate commerce.

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[31] *Phillips Petroleum Co. v. State of Wisconsin*, 347 U.S. 672 (1954); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954); and *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682 (1947).

In short, neither the Natural Gas Act, the Natural Gas Policy Act nor any other federal act prohibits state taxation of local incidences which may ultimately or indirectly increase the price paid by the ultimate consumer for the refined natural gas.

(3) Outer Continental Shelf Lands Act.

Plaintiff States argue that the First Use Tax is preempted by the Outer Continental Shelf Lands Act of 1953.[32] Section 4 (a) (2) of the Act (43 U.S.C. §1333 (a) (2) (A)) adopts state laws to the extent they are applicable and not inconsistent with federal laws and then concludes by providing that "[s]tate taxation laws shall not apply to the outer Continental Shelf." A review of the legislative history and the language of the entire section of the statute suggests that Congress intended the law to apply only within the physical limits of the OCS. House Report No. 413, 83rd Cong., 1st Sess. (1953), *reprinted in* [1953] U.S. Code Cong. and Ad. News 2177, 2180, does not use the statutory phrase "shall not apply *to* the Outer Continental Shelf" but rather interprets it to mean "cannot apply *in* these areas."

Despite this clear language that the uses subject to the tax occur solely in the State of Louisiana, the plaintiff States continue their argument that the First Use Tax is, in reality, a tax on severance or production. Not even the United States supports the plaintiff States in this argument. The statute, on its face, does not purport to tax any severance or production of natural gas from the Outer Continental Shelf. And such statutory language cannot be altered or interpreted in terms of questionable economic realities in order to create a conflict between

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[32]At one point in their brief the plaintiff States mention in passing that the First Use Tax also is preempted by and conflicts with the Coastal Zone Management Act, 16 U.S.C. §1451 et seq. (1974). Exceptions of the plaintiff States and brief in support of exceptions, at 6. A noted authority concludes, however, that the Act "does not evince congressional intent to occupy the field of coastal regulation or to circumscribe the preexisting reach of state authority." Breeden, "Federalism and the Development of Outer Continental Shelf Mineral Resources," 28 Stan. L. Rev. 1107, 1147 (1976).

federal and state authority. The tax does not reach any uses occurring in the Outer Continental Shelf: thus, the statutes are not in conflict.

Admittedly, Louisiana cannot directly tax the severance of natural gas from the Outer Continental Shelf. That is not the same, however, as saying that Louisiana and other States are prohibited from imposing a tax on local incidents relating to a product originally extracted by private producers with operations occurring in the Outer Continental Shelf.

Nothing in the Outer Continental Shelf Act, moreover, indicates broad preemptive intent, or intent to establish a comprehensive scheme to regulate natural resource development and distribution from the Shelf. The goal of the statute, rather, was to assert American territorial ownership of the Shelf, and to permit the Secretary of the Interior to lease tracts for private natural resource development. Breeden[33] emphasizes that such state legislation as zoning and pollution laws are strictly local matters that are "peripheral concerns" with respect to the intended federal scheme and cites the following passage from the *San Diego Bldg. Trades Council* case, at n. 184:

> [D]ue regard for the presuppositions of our embracing federal systems, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the [federal regulation].
>
> *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 at 243 (1959)

State taxation, such as the First Use Tax, that is aimed at compensating a State for environmental damage, governmental costs and other impacts *on state land* is clearly a concern

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[33]R. Breeden, "Federalism and the Development of Outer Continental Shelf Mineral Resources," 28 Stan. L. Rev. 1107, 1147 (1976).

"peripheral" to the federal scheme. Therefore, there exists no basis to support plaintiff States' contention of preemption in this regard.

CONCLUSION

For all the foregoing reasons, the Court should accept the Special Master's recommendations that the plaintiffs' motion for a judgment on the pleadings be denied. And for reasons previously set forth in support of Louisiana's Exceptions to the Special Master's Report of September 15th, 1980, the Court should dismiss the complaint filed by the plaintiff States.

All the above and foregoing is thus respectfully submitted.

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CERTIFICATE OF SERVICE

I, ROBERT G. PUGH, counsel of record for the State of Louisiana in the above-entitled proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the 5th day of December, 1980, I served copies of the *Reply of the State of Louisiana to Exceptions and Supporting Brief of the Plaintiff States*, by depositing three copies thereof in a United States mailbox, with postage prepaid, addressed to counsel of record at his or her post office address. Their names and addresses are as follows:

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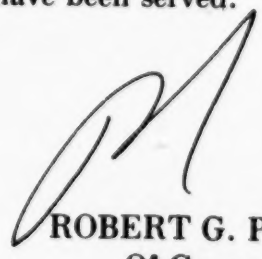

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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Number 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs

VERSUS

STATE OF LOUISIANA,

Defendant

PROFFER OF PROOF OF STATE OF LOUISIANA TO THE SPECIAL MASTER

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April 15, 1980 *COUNSEL FOR THE STATE OF LOUISIANA*

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STATE OF MARYLAND,
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STATE OF WISCONSIN,

Plaintiffs

VERSUS

STATE OF LOUISIANA,

Defendant

PROFFER OF PROOF OF STATE OF LOUISIANA TO THE SPECIAL MASTER

Pursuant to the Special Master's Order of March 21, 1980, the State of Louisiana submits herewith a *Proffer of Proof* as to what Louisiana can and will prove, as detailed as currently possible, considering the fact that no discovery has as yet been herein had. The facts hereinafter set forth are limited to those known by Louisiana and as ascertained, to date, from the on-going discovery in the state court proceedings. A detailed outline of those proceedings was heretofore submitted in Louisiana's memorandum to the Special Master under date March 29, 1980.

At the preliminary conference with the Master on March 21, 1980, Louisiana was charged with the primary responsibility of setting forth in succinct form the facts upon which it would rely in its defense of the First Use Tax. It was observed that such a request reversed the normal order of proceedings in that it required the defendant, rather than the plaintiff, to set forth the factual basis upon which the constitutional validity of the First Use Tax is to be assessed. More importantly, however, Louisiana is the one party in the best position to know and to develop all the many facts relevant to the disposition of this case. Submission of Louisiana's listing of those facts will permit the Special Master and the various complainants to assess the magnitude of the evidentiary nature of this case and to determine the extent of agreement and disagreement among the parties as to these basic facts.

This Proffer by Louisiana is also designed to disabuse the notion that the facts discoverable from the pleadings alone afford an adequate basis for a summary disposition of this major constitutional adjudication. There are many facts, call them constitutional facts, statutory facts, substantive facts and legal facts, that must be developed above and beyond those asserted in the "barebones" pleadings before the Court. Those facts must be explored in a full evidentiary-type hearing before the constitutional merits of the First Use Tax can be reached, summarily or otherwise. All the following enumerated factual propositions are not self-evident or subject to judicial notice; many of them will be disputed. Some of the propositions can be developed and proved only after there has been an authoritative state court interpretation of Louisiana's First Use Tax statute.

But whatever the controversial nature of the facts, and however difficult it may be to establish some of those facts outside the forum of the state courts, Louisiana submits that the following propositions of fact must be explored and developed if an evidentiary hearing is to be had before the Special Master. The extent and the difficulties that mark this evidentiary exercise serve additionally to underscore the prudential wisdom of this Court in recognizing that it is "structured [primarily] to per-

form as an appellate tribunal, ill-equipped for the task of fact-finding and so forced, in original cases, awkwardly to play the role of factfinder without actually presiding over the introduction of evidence." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 (1971).

In sum, Louisiana proffers and submits the following facts, subject to proof at an evidentiary hearing:

I.

BASIC FACTS

1. In terms of statutory language and economic realities, all the uses upon which Louisiana's First Use Tax is imposed relate exclusively to the local incidents of processing and refining within the State of Louisiana of unrefined or "raw gas" transported into Louisiana from the Outer Continental Shelf (OCS).

2. The processing and the refining of "raw gas" that occur within the State of Louisiana significantly and identifiably create a new and different product, known as refined or "dry gas." The differences between the two products relate to their economic value, their constituent chemical components, their energy contents, their amenability to long distance transportation, and their fitness for consumer consumption.

3. The interstate transportation of "dry gas" for distribution and use throughout the nation physically commences at the "tailgates" of the 124 processing and refining operations within the State of Louisiana. The First Use Tax is therefore imposed upon local uses or incidents that precede the commencement of any interstate transportation of refined "dry gas" for use by consumers outside Louisiana. Contrariwise, the First Use Tax is not imposed upon the "dry gas" that is delivered into the interstate transmission system at the "tailgates." Nor is the tax in any way imposed on the interstate transmission of "dry gas."

4. The State of Louisiana, by harboring and protecting the 124 local operations necessary to the interstate marketing of refined "dry gas," originating in the OCS as "raw gas," makes substantial contributions to the development of the nation's energy supplies and resources. Approximately ten per cent of the nation's "raw gas" supplies comes from federal OCS lands, and about ninety five per cent of OCS "raw gas" production occurs off Louisiana's shores and hence is processed and refined onshore in Louisiana. More than ninety eight per cent of such gas, refined in Louisiana, is ultimately transported as "dry gas" for use outside Louisiana.

5. The State of Louisiana makes substantial contributions and provides valuable support and protection to the onshore processing, refining and related activities necessary to the transformation of OCS gas from a "raw" to "dry" product. No other State makes such contributions or provides such support and protection as to OCS gas produced offshore from Louisiana.

6. Moreover, Louisiana's response to the nation's energy needs and to the commercial need to process and refine such OCS "raw gas" into a usable product has had costly consequences for the State, its renewable resources, and its people. Louisiana has incurred monumental changes in and injuries to its environment, its shoreline and wetlands, and its socioeconomic structure. Many direct and indirect costs of providing state and local governmental services for these processing, refining and supporting operations within the State have increased. The costs of providing these operations with the basic services of government, such as crime prevention, elimination of safety hazards, and provisions for public schools and public highways, have substantially increased.

7. All the foregoing benefits, protections and consequences underlie and justify Louisiana's attempt, by the enactment of the First Use Tax, to secure a fair and reasonable return.

II.

FACTS AS TO PRODUCTION, GATHERING PROCESSING, REFINEMENT, TRANSMISSION, DISTRIBUTION AND CONSUMPTION OF GAS ORIGINATING IN THE OUTER CONTINENTAL SHELF

A. OCS PRODUCTION ACTIVITIES

8. The federal OCS and all the natural gas production activities that occur therein are bounded by and are outside Louisiana's territorial three-mile limit.

9. The southern shoreline of Louisiana and its territorial three-mile limit are in the Gulf of Mexico, northward from the OCS. These southern boundary lines are fluctuating and non-static, varying from time to time dependent upon the then-landward limits of the State as determined by the existence of barrier islands, reefs and other southernmost projections of land mass. These ambulatory lines mark the boundary between the three-mile territorial limits of Louisiana and the OCS waters over which the United States asserts jurisdiction with respect to natural gas production.

10. This vast OCS mineral rich area now contains approximately 13,500 wells and produces 4.1 trillion MCF of gas per year. This raw, unrefined energy is transported from OCS to onshore Louisiana by a vast maze of gathering systems and pipelines of varying sizes up to thirty six inches in diameter and comprising over 9,650 miles.

11. In its raw state, about ninety five per cent of the OCS natural gas is brought through the fragile and changing shoreline and marshes of southern Louisiana to processing plants and refineries in Louisiana. In these Louisiana plants and refineries, the raw gas is subjected to chemical treatment and other operations necessary to make the product marketable, transportable and usable for the purposes of the ultimate consumers in Lousiana and other States.

12. Some of the gas thus produced in the OCS is known as casinghead gas - i.e., gas which results from the production of oil and which is the pressure force that allows this hydrocarbon to be brought to the surface of the earth. Other gas, however, is produced as a separate commodity through a well drilled specifically for that commodity.

13. As initially produced in its *raw state,* none of the OCS gas is of merchantable or "pipeline" quality, for it generally contains oil or other extractable and usable products. Additionally, it is permeated with salt water, sulphur, and other impurities. These must be removed before the product can become a usable energy source. Some of these impurities, particularly salt water, may be partially removed at the wellhead on the derrick floor out in the Gulf of Mexico by using various types of separators or dehydrators. Some of the oil product or distillate can be separated by simple systems and brought onshore to Louisiana through separate facilities for distribution, processing, refinement, and ultimate consumption.

14. The *raw gas* thus derived at the OCS offshore wellhead is brought in its raw state from the producing wells at various pressures, through a maze of pipeline gathering systems to the southern shoreline of Louisiana, across the barrier islands, through the marshes and the wetlands, and into massive facilities constructed on the Louisiana wetlands to refine, process, and manufacture the raw gas into *refined gas* for delivery to pipelines for transportation to the gas consumers.

15. The amount of gas which is produced offshore depends upon the mechanical and geologic capability of the well and subsea reservoir from which the gas is extracted. In some cases the amount produced depends upon the demand of the pipeline companies and their customers.

16. On some occasions, the OCS wells are produced at maximum capability with the excess gas produced during warm seasons stored in subterranean cavities onshore Louisiana. Well pressures or artificial compression systems force the gas through numerous gathering pipelines connected with each other for pur-

poses of transporting the gas from the wellhead to shore. In the processing plants and refineries in Louisiana, hydrocarbons, sulphides, hydrogens, water and other foreign elements are removed in order to standardize the commodity for use as fuel.

17. When the raw gas has been brought from the OCS to a processing plant within the territorial limits of Louisiana, it is treated or processed for the removal of impurities, water, sulphides, carbon dioxide, nitrogen and hydrogen by sophisticated processes. There are 124 processing plants within Louisiana, which process about 95% of the OCS gas.

18. These Louisiana processing plants typically occupy about 75 acres of land, represent a present cost value of $40,000,000 each and handle an average volume of approximately 500,000,000 cubic feet of raw gas per day. Louisiana will show the location of these various processing plants within the State of Louisiana and the gathering pipelines which connect to the inlet side to bring the raw gas into the facility with the outlet side to take the *refined gas* out of it.

B. CONTRACTUAL ARRANGEMENTS

19. The United States, as the owner of the OCS seabed, leases to various producers and explorers the right to explore and produce natural gas from that seabed. Raw gas is then moved from the wellhead or wellbore (represented physically by a platform in the Gulf of Mexico) to the onshore processing plant in Louisiana, subject to various contractual arrangements, and undertakings, between the parties. In some instances, the producer of the gas sells the product to the pipeline at the wellhead. The ownership of the raw gas is transferred at that point. The pipeline then brings the product onshore where it either carries it through the processing system itself or arranges, by agreement, for others to process the raw gas. The producer, who has sold the gas to the pipeline company, reserves the right to retain certain extractable components as full or partial compensation for the cost of processing or refining and in these instances, the pipeline company delivers the product in its raw state to a predesignated

processing plant onshore through its gathering system.

20. In other instances, the producer merely employs the pipeline company at a fixed fee to transport the raw gas, from the wellhead to a predesignated processing plant onshore, either owned by the producer or subject to its control, through a complex series of contractual agreements with other persons.

21. In still other instances, the producer owns not only the well but also all or a share of both the pipeline and processing plant and, therefore, unilaterally controls the processing or treating operation. Then he sells and delivers the refined natural gas directly to the interstate pipeline systems at the tailgate of the plant.

22. All these separate and varied arrangements depend upon conflicting legal and economic considerations primarily relating to capital improvements necessary to gather and transport the raw gas onshore, and then to carry it through the costly processing and refining operation.

23. The usable products which are removed in the processing or refining procedure enjoy a merchantable value beyond the cost of removing them. The removed products include butanes, propanes, and ethanes, which are transported by other pipeline systems into chemical plants for use as feedstock and fuel.

C. NATURAL GAS - AN ENERGY SOURCE

24. Natural gas has value as an energy source and as such it is comparable directly to many other fuels. The same type and measureable quality of energy is provided by fuel oil, coal and nuclear power. The quality of energy or the value of the product as an energy source is uniformly measured by British Thermal Unit content (BTU). A BTU is the amount of energy necessary to raise the temperature in one gram of water one degree centigrade. It is the standard stated computation for an energy source of any kind and the basis for value determination.

25. Natural gas is normally measured in cubic feet. The term "MCF" means one thousand cubic feet and, as the name indicates, it is entirely volumetric. This is the amount of gas which exists in a thousand cubic feet of space at a specified pressure and temperature. Since this measure is volumetric, it does not necessarily relate to the heating content or energy value of the product in question.

26. Some natural gas contains a larger amount of energy (or BTU) than does other natural gas, but the standard of measurement, or energy content, in a thousand cubic feet of natural gas has now become by convention, contract, and uniform acceptance, one million BTUs, i.e., a thousand cubic feet of natural gas (1 MCF) is now customarily required by contract, convention, and economic standardization, to contain one million BTUs of energy. Therefore, one MCF of gas is expected to produce one million BTUs of energy and its price is adjusted accordingly. A poor quality of natural gas containing only 900,000 BTUs suffers a price reduction equal to ten per cent. An MCF of natural gas which contains 1.1 million BTUs enjoys a price increase in a like amount.

27. Much of the gas produced offshore Louisiana comes to the surface with much higher BTU content per MCF than this specified standard amount. These additional BTUs are represented by other products and properties which enjoy significant and separate merchantable value. In the processing and refining operation, these additional products are removed in proportions necessary to reduce the BTU content to the standard of 1,000,000 per MCF. Only after they are removed, along with the impurities and corrosives, does the raw gas produced from the Outer Continental Shelf have a standardized pipeline or consumer quality. This operation is sometimes referred to as "stripping" the gas, which means removing the other energy sources and contaminants from it and leaving the contractual standard of BTU content for transportation into the interstate pipeline system. The physical facilities of local distributors and ultimate consumers are designed and constructed for the measurement

and use of pipeline quality gas and are not capable of efficiently or safely burning various qualities of BTU content without economic loss, serious hazard, and rapid deterioration of facilities. The quality of the product delivered into the interstate pipeline system must be carefully controlled for ultimate safe distribution and use in the homes and industries of the plaintiff states.

28. The value of the products which are removed from the raw gas exceeds the cost of removing them (i.e., the value of the gas itself is enhanced by that amount) or otherwise it would not be feasible economically to engage in the costly processing operation and adjustments would be made in contract price by recomputation based on BTU content. The value thus added through the processing of the gas contributes a substantial portion to the total value of the refined gas product. The transportation cost of the refined gas is significantly reduced, as it costs far less to transport the pipeline quality or refined gas than it does the raw gas. Substantial savings are realized by the ultimate user as well as the pipeline transporters whose lines, compressors, and equipment are spared the weight and corrosive effects.

D. THE PROCESSING OR REFINING OPERATION

29. In the processing plant, the natural gas gathered from far offshore and sometimes commingled with onshore gas flows through a complex system consisting of many miles of various sizes of pipe and is subject to many and varied chemical, pressure and heating treatments.

30. The raw gas is heated and then cooled; it is injected with an oil base product which is subsequently removed; its pressure is raised and it is lowered for various periods of time at various stages in the process. Its BTU content is dramatically altered and its molecular makeup is significantly affected. Sensitive quality controls allow a predetermined amount and quality of product to be removed and thereby adjust the ultimate BTU value of the finished product.

31. After this complex and costly procedure the product which remains is of uniform quality and BTU content (one MMBTU per MCF) and is principally methane of vastly different character from that raw gas which was produced on the Outer Continental Shelf and brought to the inlet of the plant.

32. Economic considerations require that the producers, pipeliners, or processing plant owners seek to remove even "the squeal from the pig itself" in order to get the maximum merchantable product out of the raw gas which is produced offshore. This clearly recognized addition to the value of the product represents a one-time, necessary manufacturing operation which is essential to the use of the product for any purpose.

33. After the usable by-products and corrosives are extracted the refined gas is of "pipeline quality." At the tailgate of the processing plant the refined product is contractually acceptable and the commodity, which is ultimately consumed in the plaintiff States, enters the interstate commerce stream for distribution and consumption. Prior to these operations it is nothing more than raw material to be gathered, treated, prepared, and processed for the various commercial merchantable uses to which it is destined.

34. Natural gas of various owners is carried to the processing plants at the same time and correct accounting procedures must be utilized for ownership and charging purposes.

35. From the tailgate of these processing and refining facilities, the natural gas, in its refined commodity state, is then carried by a complex system of transmission pipelines out of the State of Louisiana and into other parts of the nation to meet the incessant demand for energy.

E. PRICING AND MARKETING

36. For many years, the wellhead price of interstate natural gas was regulated and controlled by federal statutes and various governmental agencies. The Federal Energy Regulatory Commission (FERC) [successor to the Federal Power Commission

(FPC)] is vested with wellhead price regulating authority. Until recently only the sale of gas in the interstate market was subjected to pricing control by federal law. Intrastate gas was subject only to the operation of a free market system.

37. By 1976, due to the impact of artificial prices on interstate gas acquisitions, there was a severe shortage which developed within the interstate system and governmental action was taken to permit the sale of intrastate gas at higher prices to the interstate system. At a time when the interstate system was deficient in gas supplies, there was adequate gas within most intrastate systems to meet the demands of their customers.

38. By subsequent legislation, the federal government imposed wellhead price controls on all gas sales, intrastate as well as interstate. The Natural Gas Policy Act of 1978 (NGPA) brought about price restrictions on all wellhead gas sales. A complex system of pricing mechanisms was provided, with varying prices for gas dependent upon the category of natural gas in question and the date of its discovery. In general, newly discovered natural gas has been furnished a new gas price ceiling while old fields or reservoirs are subject to previous price regulation, and certain classifications of gas are left entirely to the operations of the free market. In all instances, however, gas pricing contemplates adjustment for BTU content at the delivery point.

39. While natural gas prices have escalated in interstate commerce, it remains the most reasonable source for energy on the world market today. The comparably lower prices have attracted new gas customers throughout the nation.

40. Against this background of fundamental energy production and refinement for market, the Louisiana Legislature considered and enacted the First Use Tax. It was designed to insure that necessary operations and uses performed in Louisiana in connection with the preparation of OCS raw gas for marketing bear the same tax burden as borne by the operations and uses performed in Louisiana relative to the marketing of local raw gas.

F. LOUISIANA'S FIRST USE TAX

41. About 30% of Louisiana's revenues are directly derived from oil and gas related activity, principally royalties paid to the State on production from state owned lands and severance taxes paid on gas produced from within Louisiana's territorial limits.

42. Louisiana's severance tax, amounting to seven cents per MCF on all gas produced within the State of Louisiana, is exactly the amount of the First Use Tax. Louisiana's consumers of natural gas will, along with the consumers of all other states, bear their proportionate share of the cost of both the severance tax and the First Use Tax to the extent that they utilize gas as an energy source.

43. Over 98% of the raw OCS gas which is brought onshore Louisiana, processed and placed into the interstate pipeline transmission system, goes outside Louisiana for use and consumption. Of the natural gas produced within the borders of the State of Louisiana, approximately 75% is transported outside Louisiana by the same interstate pipeline system.

44. Louisiana faces declining gas production and markedly reduced reserves. Diminishing revenues from these sources have become a reality of life confronting both governmental and private sources.

45. Louisiana's state debt now exceeds 1.7 billion dollars and she faces additional losses as a result of depleting revenue sources. Louisiana's ambulatory shoreline is receding from erosion, due in part to offshore mineral production and pipeline activities, and thus is contracting the three-mile outward area of state ownership. All this poses imminent loss of state mineral revenues.

46. Louisiana foresees serious problems of satisfying increased demands for public services directly and indirectly related to the impact of gas marketing on a declining tax base, coupled with the payment of 1.7 billion dollars of debt on the same diminishing tax base. The inevitability of additional tax

measures to support these public services and to retire state debt has created a need to supplement depleting mineral revenues with additional justifiable measures from comparable sources.

47. The first well out of sight of land was drilled off the coast of Terrebonne Parish in Louisiana by the Kerr-McGee and Brown & Root joint venture in 1947. Since that time, gas resources in the OCS off the coast of Louisiana have been developed in the interest of national energy needs but at considerable risk to the environment of Louisiana, which includes the greatest wetland area in the United States. OCS activity is still increasing offshore Louisiana while many other States (some among the plaintiffs here represented) continue to resist even the initiation of exploration or production off their borders.

48. Louisiana has contributed to the development of OCS gas resources off its shores by allowing the construction and maintenance of pipeline gathering systems across its barrier islands, its shorelines, its marshes and its wetlands.

49. Louisiana receives no revenues for its support of these OCS activities that even approaches a reasonable compensation for the actual costs and damages incurred by the State.

50. The massive industrial development of the OCS gas resources off the Louisiana coast has occurred without the industry being required to contribute in any way to the operation and maintenance of the government and supporting services provided by Louisiana. Louisiana receives no royalty income from the production of gas in the OCS area. And Louisiana provides an exemption from the state sales tax for all equipment and supplies used and consumed in the production of gas in the OCS. The processing and refining plants in Louisiana enjoy a manufacturer exemption from ad valorem taxation.

51. Unlike most other States, Louisiana is precluded from sharing in federal revenues derived from mineral and forest production on federal lands located within the State. Such sharing by other States is allowed as direct compensation for the impacts they sustain in supporting commercial production on such lands.

52. Louisiana realizes substantial losses from its direct support of the production and preparation for market of the OCS raw gas. It is permitted to use less than two per cent of the OCS gas within the State. At the same time, Louisiana is required by federal law to begin the importation and use of coal produced in other States, taxed there at rates up to 30% by the States and up to 12½% by the federal government.

53. The First Use Tax became effective on April 1, 1979. It imposes a tax on activities occurring within the State at the rate of seven cents per MCF, measured at the tailgate at the conclusion of the refining processes but prior to the delivery of the refined gas to the interstate transmission systems. The tax is not imposed upon the gas itself, either in its raw or its refined stage. Nor is the tax imposed upon the privilege of transporting the gas from those refining operations to the interstate transportation systems. Nor is the tax laid upon the right to engage in the production of this OCS gas offshore, nor upon any activity or operation occurring in the OCS areas.

54. The First Use Tax is imposed upon eight enumerated uses, all of which are a part of or related to the processing and refining activities that occur solely within the State of Louisiana. Such activities are not capable of being duplicated in any other State with respect to raw OCS gas that is gathered, processed and refined in Louisiana.

55. The First Use Tax is imposed upon "the owner of the gas" at the time when the first of any of the eight enumerated uses occurs. By this definition, in 85% of the cases the owner is a natural gas pipeline company, claiming that it acquires title to the gas at the OCS wellhead. In the remaining 15%, the owner is the producer who maintains ownership of the gas throughout the entire gathering and processing stages. Determination of ownership is dependent upon the contractual arrangements among the parties.

56. The seven cents per MCF tax rate imposed by the First Use Tax is identical with the tax rate imposed by Louisiana's severance tax on natural gas produced within the State. Such

territorial gas is gathered, processed, and used in the identical manner as OCS gas.

57. The First Use Tax does not require or even contemplate that the owner of the gas, upon whom the use tax is levied, pass on the cost of the tax to the ultimate consumers. Nor does the First Use Tax require or even contemplate that the owner of the gas seek any approval or authorization from the Federal Energy Regulatory Commission, or any other regulatory body, to pass the tax cost on to the ultimate consumers in the form of higher gas consumption prices.

58. The actions of the gas owners in refusing to absorb the costs of this use tax, as well as their actions in seeking and obtaining the approval of the Federal Energy Regulatory Commission to pass-through the tax costs to the ultimate consumers, are totally voluntary in nature and are in no way dictated or required by the terms or policies of Louisiana's First Use Tax.

59. The Federal Energy Regulatory Commission's orders (Orders 10, 10A and 10B), approving the pass-through of the Louisiana use tax to the ultimate consumers, were issued pursuant to a statutory discretion conferred upon the Commission to permit just such a pass-through to be effectuated. The Commission was not compelled by law to approve the pass-through in this instance.

60. The fact that the owners of OCS-produced gas have succeeded in passing on the incidence of the First Use Tax to ultimate consumers in other States is not evidence of any discrimination against such out-of-state consumers. The incidence of this tax has also been passed on to Louisiana consumers of OCS-produced gas. And both the in-state and out-of-state consumers of natural gas produced within Louisiana, on which a severance tax has been levied in precisely the same amount, are compelled to pay the costs of that severance tax as a result of authorized adjustments in the consumer rate schedules.

61. Thus, for the first time in Louisiana's history, the activities occurring within the State in relation to the gathering,

processing, and refining of OCS-produced gas have been asked to provide Louisiana with reasonable and equitable compensation for having assumed the risks and incurred the impacts, burdens and governmental responsibilities associated with these massive industrial activities.

62. The purpose of the First Use Tax is to prevent the waste of Louisiana's natural resources and to equalize competition between Louisiana's territorial gas marketers who pay the severance tax and the offshore marketers who otherwise pay no tax at all. The tax requires this major industry to pay its own way and to contribute to local and state governmental costs in the proportion, and in a fair relationship, to the services which are provided and to the risks and hazards which are incurred. A portion of the tax proceeds are specifically designated for the restoration and preservation of Louisiana's eroding state shoreline and the maintenance and upkeep of its marsh and wetland area. Exposures and impacts to the State's waterbottoms, barrier islands and coastal areas are almost inestimable and the First Use Tax will allow Louisiana, for the first time, to adopt broadbased protective measures and safeguard systems to insure the restoration and perpetuation of these and other valuable resources.

G. ENVIRONMENTAL AND ECONOMIC CONSIDERATIONS

63. The environmental area in question, so far as Louisiana is concerned, extends from the Gulf of Mexico on the south to the higher ground some twenty to forty miles north and inland, approximately bounded by the Thirtieth Parallel on the North. The OCS gas enters the shoreline of Louisiana from numerous locations in pipelines typically ranging from twelve to thirty six inches in diameter. These lines are installed by various methods, all involving the digging of canals and ditches with the necessary berm, spoil bank and destruction of the natural environmental makeup, together with backfill, dissection, machinery, equipment and deterioration of immediate areas. Surveying and

alignments are established and marked, with the aid of marsh buggies having wide tracks which cause a significant impact upon the marshland.

64. The entire coastal area of Louisiana is characterized by a wetland area of bayous, swamps, ponds, standing waters, and marshlands. Along the coasts, tides and wave action have produced little vegetation or peat formation and support with only pioneer species of plantlife and shore birds. Behind this protective sea rim are vast areas of salt marsh with frequent inundations of salt water resulting from natural storm tides maintaining customary and essential salinities. The vegetation here is broken down and flushed by tides and the saline balance of these areas is maintained as a vital aspect in the maturing of enormous values in fish, shellfish, fur bearers, and other dependent species.

65. Further inland where the pressures of fresh water flow compensate for tidal pressures, a mixing zone occurs and in these brackish marshes are found the most productive estuaries in the world for a myriad of species of fish and commercial marshland products. It is in these moderately saline marshes that the greatest danger of destruction from salt water intrusion through industrial activities exists. Upsetting the delicate balance between fresh water flushing and salt water inundation has devastated significant portions of this area and will totally destroy this area in the immediate future unless corrective measures are funded and taken.

66. Still further inland, areas normally protected from salt water produce a different type of fresh water marsh where plant species and different abundant water life habitation is found. Coastal Louisiana has a wide range of environmental characteristics important to all forms of terrestrial and marine life. High productivity of fur, waterfowl, oysters, fish, and shrimp indicate something about the magnitude of the importance of these various products to man. About 4,000,000 acres are involved in the various types of marsh vegetation.

67. In 1977 commercial fish and shellfish landings in Louisiana coastal and inland waters amounted to 920,000,000

pounds with a value in excess of $138,000,000. Fur-bearing animals, such as muskrat, mink, and nutria, produced a fur value of twelve and one-half million dollars in the 1976-77 season. Agricultural products sold and consumed in the marshland areas represented a total economic input of over $335,000,000. These and other renewable resources are directly dependent for their existence upon the maintenance of this remarkable coastal environment. Fresh and salt water imbalances and intense-user activities are among the major problems facing coastal Louisiana. This estuarine system produces about twenty eight per cent of the nation's total commercial fish harvest and must be protected and safeguarded.

68. In 1974 substantially all the 124,000 employees directly involved in OCS gas production and marketing were residents of Louisiana. With the addition of families and related household members, this human count exceeded 390,000 people. At that time, more than six years ago, the uncompensated cost to the State of Louisiana exceeded $183,000,000 per year and $84,000,000 at the parish and municipal government levels. On a per-capita cost of governmental services, it has been estimated that Louisiana annually expends $267,000,000 to provide the benefits of government and public services to the persons attracted to this State by the OCS-related energy industry. Some personal taxes are collected from these individuals but the cost of services far outweighs such minimal revenue sources.

69. Huge sums are paid by the natural gas industry to the Federal Government in the form of bonuses and royalties for offshore operations. There is no direct sharing of these amounts with the State of Louisiana for the services, facilities, and benefits provided. In 1978, more than $627,000,000 in royalties were paid to the Federal Government by onshore-based firms operating beyond the imaginary three-mile boundary offshore Louisiana for natural gas production only.

70. There are certain positive aspects associated with the development of the natural resources offshore Louisiana. These result from employment opportunities, both directly and in-

directly, and the encouragement of development of supporting and complementary businesses resulting in a better economic climate. On the other hand, this has created massive problems which the population center of Morgan City, Louisiana now typifies. This once quiet coastal fishing village initially celebrated the fact that the first oil well out of sight of land was drilled off its shore. The town is now a collection of fastfood franchises, mobile homes, motels, and bunkhouse type hotels where workers gather to drink beer and watch a communal television set. Adequate housing is scarce. Huge piles of rusting steel scraps litter the road for miles and the landscape is an industrial wasteland.

71. State and local governmental units in Louisiana are not able to secure adequate revenues through taxes from firms engaged in OCS gas activity, although these firms have a direct and indirect impact on services required. These impacts bear not only on port facilities, schools, medical facilities, and environmental management services, but on the entire range of governmental activity. The production of mineral resources from the OCS generates social costs regardless of where the area is, whether offshore Louisiana, California or Massachusetts. The magnitude of the onshore impact of OCS activities will vary depending upon how the tax structure for the region is set up and the relative importance of OCS activity to other economic development.

72. In 1970 only some 300 gas wells were situated within the state territorial waters offshore Louisiana, while 1300 were situated in the federal OCS. Since that time, the numbers have changed dramatically. During the decade of the Seventies, 12,276 wells have been drilled in the federal OCS, while drilling in state waters declined proportionately. Of the offshore production in the Gulf of Mexico, south of Louisiana, about 90% is in the OCS and only about 10% is from Louisiana controlled waterbottom. In 1971 Louisiana was losing over $183,000,000 per annum tax revenues and in 1979 this amount has more than doubled.

III.

STATUTORY FACTS AND QUESTIONS

73. Since the constitutionality of the Louisiana First Use Tax depends in large part upon the particular facts and circumstances to which the statute is applied, the following factual inquiries must be made and evidence must be supplied with respect to each inquiry:

a. As respects each taxpayer, which of the eight enumerated uses first occurs in Louisiana and in what order do subsequent uses, if any, follow?

b. Has the first enumerated use, to-wit: *sale*, been performed and has the tax been assessed on that basis as to any taxpayer?

c. Has the second enumerated use, to-wit: *transportation in the State to the point of delivery at the inlet of any processing plant*, been performed and has the tax been assessed on that basis as to any taxpayer?

d. Has the third enumerated use, to-wit: *the transportation in the State of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility*, been performed and has the tax been assessed on that basis as to any taxpayer?

e. Has the fourth enumerated use, to-wit: *the transfer of possession or relinquishment of control at a delivery point in the State*, been performed and has the tax been assessed on that basis as to any taxpayer?

f. Has the fifth enumerated use, to-wit: *processing for the extraction of liquefiable component products or waste materials*, been performed and has the tax been assessed on that basis as to any taxpayer?

g. Has the sixth enumerated use, to-wit: *use in manufacturing*, been performed and has the tax been assessed on that basis as to any taxpayer?

h. Has the seventh enumerated use, to-wit: *treatment*, been performed and has the tax been assessed on that basis as to any taxpayer?

i. Has the eighth enumerated use, to-wit: *other ascertainable action at a point within the State*, been performed and has the tax been assessed on that basis as to any taxpayer?

j. Should the first enumerated use not occur in Louisiana may the second or subsequently enumerated uses occurring in Louisiana be the subject of the imposition of the tax?

k. Is the public policy of the State in support of the statutory provision declaring certain contractual provisions unenforceable consistent with the factual basis supporting the announced public policy?

l. Is there sufficient justification or State interest to support the granting of an exemption from the tax to certain uses of natural gas within the State?

m. Does the severance tax credit statute amend the First Use Tax statute?

n. Does the tax credit for electric and natural gas service statute amend the First Use Tax statute?

o. Does the application of the severance tax credit statute create a discriminatory first use tax?

p. Does the application of the tax credit for electric and natural gas service create a discriminatory first use tax?

q. Who is entitled to claim a tax credit under the tax credit for electric and natural gas service?

r. Does the granting of a gas severance tax credit subject the owner of the then untaxed domestically produced gas to a first use tax liability when the gas undergoes any of the enumerated uses in the statute upon which the first use tax is imposed?

s. What incidents qualify to support a claim for a tax credit under the tax credit statute for electric and natural gas service?

t. What contractual language will suffice to trigger application of Section 4 of Act 294 of 1978?

u. What effect, if any, do the rules promulgated by the Louisiana Department of Revenue to implement the tax have on the constitutional applications of the tax?

v. What effect does the declaration of severability in Section 2 of Act 294 have upon the severability of Section 4 of said act?

w. Do the provisions of Section 1303 (C) of Title 47 of the Louisiana Revised Statutes prohibit the contractual shifting of tax liability by contracts entered into on and after the effective date of Act 294?

x. Which one, if any, of the enumerated uses can be considered a cost or expense attributable to processing under the terms of Section 4 of Act 294?

y. Does Article VII, Section 4, Sub-section B of the Louisiana Constitution of 1974 prohibit the imposition of the First Use Tax on uses of gas produced within the State upon which no severance tax is imposed?

z. What are the essential components of transportation of raw gas to a processing plant which distinguish it from transmission of refined gas to markets for use?

74. All the eight enumerated uses permit the tax to be assessed in any particular case only upon an activity or use that is an ingredient of or related to the gathering, processing and refining of OCS raw gas within Louisiana before the refined gas is delivered to interstate transmission systems. Absent such processing in Louisiana, none of the other enumerated uses would necessarily permit the imposition of the First Use Tax on any taxpayer. And, Louisiana has in fact imposed no use tax on any enumerated usage by a taxpayer save where OCS raw gas has been gathered, processed and refined solely within the State.

75. The Louisiana Supreme Court has had no opportunity, as yet, to make any definitive interpretation of the First Use Tax statute or to determine the propriety of the application of the First Use Tax to uses that have so far been made.

IV.

FACTS SHOWING COMMERCE CLAUSE INAPPLICABLE

76. The movement of refined natural gas in interstate commerce commences at the tailgate or outlet of the gathering and processing plant where the natural gas company accepts delivery for transmission to the ultimate consumers.

77. The "production or gathering" of natural gas is exempted from the federal regulatory domain by the terms of Section 1 (b) of the Natural Gas Act for "production" and "gathering" are "terms narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stage of distribution." "Raw gas" is not in a state suitable for marketing or distribution at the time of its production at the wellhead on the offshore platform. The commodity purchased at the wellhead by natural gas companies is dedicated to interstate commerce by virtue of its origin in the Outer Continental Shelf and contains other definable commodities and corrosives. Until the commodity purchased (i.e. an MCF of gas containing one million BTUs and no corrosives) is deliverable and delivered, the terms of the contract are not met and the marketing and initial distribution of the natural gas has not commenced.

78. Of the eight enumerated uses of natural gas within Louisiana which are subject to imposition of the First Use Tax, the first five uses enumerated are physical acts or activities necessary in preparing the raw natural gas "for its first stage of distribution." Until the first five uses enumerated are performed upon the raw natural gas, the natural gas companies do not take delivery of the actual commodity purchased. The natural gas companies take delivery of the commodity purchased from the producer at the "tailgate" of the gathering and processing plant located in Louisiana. The first five uses enumerated are exempt from federal regulation as part and parcel of the gathering system.

79. Until (1) the central gathering of the raw gas stream is accomplished, and (2) the substantial physical activities and processing onshore are completed, and (3) the refined commodity reaches the "tailgate" or outlet of the gathering and processing plant for delivery to and transmission by a natural gas pipeline company, there can be no marketing or initial distribution for consumption of the actual commodity purchased because such refined commodity does not exist until then.

80. The taxable incidences all occur while the raw natural gas is in the unregulated gathering system and prior to the point where the refined natural gas enters the market for transmission in interstate commerce.

V.

FACTS SHOWING COMPLIANCE WITH COMMERCE CLAUSE REQUIREMENTS

81. The Louisiana First Use Tax is imposed solely upon local activities that precede the introduction of refined OCS gas into the interstate stream or transmission of that product. But even if, as the complainants assert, the stream of interstate commerce be defined as extending from the OCS wellhead to the consumer's burners, facts are available to demonstrate that the imposition of the First Use Tax is fully consistent with the constitutional principle that interstate commerce must bear its fair share of direct state taxes.

82. Under appropriate factual conditions, interstate commerce may be directly taxed by a State so that the industry pays its fair share for benefits received. The factual criteria for a constitutional imposition of a direct tax on interstate business are: (1) the tax must be applied to an activity with a substantial nexus to the taxing State; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to the services provided and to the benefits received. All those criteria have been met by Louisiana.

A. SUBSTANTIAL NEXUS

83. In order to assess the sufficiency of nexus between the activity upon which is imposed Louisiana's First Use Tax and the State, it is necessary to recognize the "uses" taxed by Louisiana. The First Use Tax is imposed on the following enumerated uses:

a. the sale;

b. the transportation in the State to the point of delivery at the inlet of any processing plant;

c. the transportation in the State of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility;

d. transfer of possession or relinquishment of control at a delivery point in the State;

e. processing for the extraction of liquefiable component products or waste materials;

f. use in manufacturing;

g. treatment; or

h. other ascertainable action at a point within the State.

84. Facts which must be discerned with respect to the nexus of these uses include but are not limited to the following:

a. Outer Continental Shelf (OCS) activity off of the coast of Louisiana composes the most productive, sophisticated, and complex natural gas network in the northern hemisphere. The Federal OCS in the Gulf of Mexico contains approximately 366 fields. Of these, 232 primarily produce gas, at production depths from 1,000 feet to 25,000 feet, with the majority of production occurring between 8,000 and 12,000 feet. As of the end of 1978, 37.6 trillion cubic feet of new gas had been produced from these Federal OCS lands. Since the inception of the OCS Leasing Program, there have been approximately 2,000 fixed structures erected in OCS waters offshore Louisiana from which approximately 13,576 exploratory holes have been drilled.

b. As of 1977 the area contained approximately 9,650 statute miles of gathering pipelines from production units in the OCS to the 124 gas processing plants within the

boundaries of the State of Louisiana. Production and gathering from this area represented approximately 97 percent of the total U.S. offshore production under both Federal and State leases in 1977.

c. In connection with OCS natural gas operations, one or more onshore operations bases are established to support gas activities in a given offshore region. The actual number of operation bases in a given area will depend on several factors: the number and distribution of lease holdings, the number of companies with holdings, the amount of dependent activity and the distance from the onshore base to the leased tracts. In the Gulf of Mexico off of the Louisiana coast the first offshore well was drilled in 1947. In the 33 years since that date, operational bases and related facilities associated with natural gas production have been strategically located in virtually every accessible area along the 1,200 miles of Louisiana's coastline. Of the 124 gas processing plants in Louisiana, 80 plants are located within Louisiana's fragile coastal marshlands. As a general rule, an operations base includes helicopter pads, warehouse base, offices, staging area and dockage, and associated facilities requiring approximately 50 acres of land. Locational requirements include an inland water dock site with ocean access accommodating drafts to 15 feet in a planned or existing industrial area and necessary infrastructure (water, utilities, highway access, etc.) must be available.

d. Operations bases and services established to support exploration activities normally continue serving offshore operations in development drilling. The operation bases themselves, and many of the service companies, will also support the production phase. Through the first six years of these operations, in excess of 600 persons will be employed by companies holding those OCS leases or providing services associated therewith for each lease in the OCS off of the Louisiana coast. In the next five years additional lease sales occurring in the OCS waters off of Louisiana's coast are expected.

e. Gas processing plants are tied to the productive life of a field (or fields, if more than a single field is connected by pipeline to the facility). To achieve maximum efficiency, processing facilities require a site near the area of production. The most important locational factors in siting a gas

processing plant are proximity to the source of production and to the distribution system. Sites selected for these facilities have historically been in the proximity of the landing site of OCS gas gathering pipelines and, as a consequence, 95 percent of all new gas processing plants for Gulf of Mexico OCS gas production are located within Louisiana. A gas processing plant with a capacity of 300 mmcf/day requires between 20 and 75 acres for the site. Future OCS production will cause an expansion of existing facilities in addition to possible construction of new plants, depending upon the magnitude of future discoveries.

f. In excess of 9,000 miles of gathering pipelines have been laid through coastal Louisiana and the associated OCS lands as a result of OCS operations. In order to bring these gathering lines onshore to gas processing and storage facilities, it is necessary that canals be dredged through the delicate Louisiana wetlands and marshes, resulting in significant annual losses to the Louisiana environment and ecosystem.

1. Dredging for channel construction associated with the pipe laying activities affects the Louisiana coastal environment in a number of ways:

(a) by removal of marsh and barrier land surfaces to water bodies;

(b) by disturbance of waterbottom habitats;

(c) by removal of waterbottom materials, both benthic and sessile organisms are affected;

(d) by creation of deep water areas that may either expose or collect toxic materials;

(e) by release of low density sediments, dissolved or absorbed chemicals or toxics and nutrients;

(f) by increasing intrusion of saline waters into previously fresher water areas;

(g) by exposing new bank surfaces to erosion, thus accelerating land loss;

(h) by changing water circulation patterns between salt, brackish, and freshwater marsh areas;

(i) by affecting terrestrial and aquatic habitats through spoil disposal activities;

(j) by alteration of natural drainage processes;

(k) by destroying fauna nesting areas;

(l) by creating a transient turbidity that temporarily affects both sessile and nekton organisms;

(m) by burial of sessile organisms through sediment accumulation.

2. Spoil disposal associated with channelization for gathering lines will affect the environment in a number of ways including:

(a) by spoil bank interference with circulation in the marsh areas;

(b) by redistribution of nutrients, pathogens, and toxic chemicals contained in spoils;

(c) by covering plants, eggs, larvae, and larger organisms and in general by covering high bio-mass substrates with low bio-mass spoils;

(d) by interfering with the physiological processes of aquatic organisms through suspended sediments;

(e) by reducing photosynthesis through turbidity increases;

(f) by compounding eutrophication.

g. Each enumerated use subject to Louisiana's First Use Tax Act has a clear nexus to the State of Louisiana, as follows:

(1) *The sale of natural gas:* The sale of a substantial portion of raw gas produced in the Federal OCS off of Louisiana's coast occurs subsequent to the entry of the gas within Louisiana's boundaries. Such sales may occur at the point of delivery at a processing plant or storage facility, during a time period associated with processing or storage, or at any other points of delivery designated by parties to the sale. All sales of this nature occur within the boundaries of the State of Louisiana.

(2) *The transportation in the State to the point of delivery at the inlet of any processing plant; the transportation in the State of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility:* In excess of 90 per cent of all gas produced on Federal OCS lands off of the Louisiana coast is transported by pipeline gathering systems to processing plants or storage facilities located in Louisiana. Such gathering lines traverse the boundaries of the State of Louisiana and stop within Louisiana's territorial limits.

(3) *Transfer of possession or relinquishment of control at a delivery point in the State:* The majority of all gas entering the State of Louisiana from Federal OCS lands involves a transfer of possession or relinquishment of control by the owner at a delivery point within the boundaries of the State of Louisiana.

(4) *Processing for the extraction of liquefiable component products or waste materials:* Gas produced from Federal OCS lands and transported into the State of Louisiana is processed and transformed into pipeline quality refined gas at facilities located within the boundaries of the State of Louisiana. One hundred twenty-four gas processing plants are located within the boundaries of Louisiana, and plant owners have contracted to perform essential functions to make the gas marketable. All raw natural gas received at processing plants in Louisiana contains extractable liquefiable hydrocarbons and corrosives in suspension which make the raw natural gas unfit for long distance transportation and unusable for general public consumption. These liquefiable hydrocarbons and corrosives include: propane, isobutane, normal butane, isopentane, normal pentane, ethane, hexane, water, sulphur, carbon dioxide, and nitrogen.

(5) While each gas processing plant in the State of Louisiana may vary in the types of operations and procedures used at the plant, the following materials generally describe the type of operations which occur upon receipt of raw natural gas by a processing plant in Louisiana. In some instances, water may be partially separated from the raw gas at the well head or

removed at a dehydration plant or separator onshore prior to processing. At the processing plant the raw gas enters an inlet separator which removes any condensate from the raw stream. As there are still extractable hydrocarbons remaining, the gas flowing out of the separator is sent to absorption towers where additional liquids are absorbed out. When the gas enters the absorption tower, it flows against absorption oil. The gas generally enters in at the bottom of the tower and out at the top. As the gas moves up the tower, oil is pumped against the flow of the stream of gas and the oil absorbs liquefiable hydrocarbons out of the raw gas stream. All of the liquefiable hydrocarbons are extracted in the absorbor, and they are then contained in the absorption oil. From the absorbor the oil goes to a still where heat is applied and the pressure controlled so that the hydrocarbons will take the form of the liquid, be boiled-off, and leave the oil for recirculation. The boiling-off of liquids by heat and pressure is called fractionation and an additional fractionation process separates the various absorbed hydrocarbons (propane, butane, etc). The natural gas remaining after absorption is generally called residue gas and the residue gas may, as necessary, be sent from the absorption towers through a dehydration unit where water and other undesirable elements remaining in the gas are separated out. The remaining dry gas product is then delivered at the tailgate of the plant to the pipeline company or other purchaser as "pipeline quality" gas ready for transmission and consumption.

The above described processing is absolutely mandatory to convert raw natural gas into a marketable commodity.

(6) *Use in manufacturing; treatment; or other ascertainable action at a point within the State:* Research indicates that some raw natural gas brought into Louisiana from the OCS is treated and used directly in various petrochemical feedstock applications within Louisiana.

h. There is a substantial value added in Louisiana as a result of the uses to which the gas is put in the State. This value added is distinct and comparable to value added to other commodities of commerce from manufacturing and

marketing activities associated therewith. This value added is only due to the uses and activities related to raw gas which occur in Louisiana prior to its refinement and delivery to its owners for transmission and consumption.

i. The operation of natural gas activities stemming from OCS production creates costs and benefits to the State of Louisiana which form a nexus between the State and the uses enumerated in Louisiana's First Use Tax. The costs and benefits to the State come from three sources:

(1) The onshore activity related to the discovery, development, and production of natural gas wells;

(2) The onshore activity related to the gathering, storage, and processing of the output from these wells; and

(3) The induced economic activity generated by the supply of input to OCS related activity and by the supply of raw natural gas which is the output of that activity.

j. The inputs which are used in OCS related activity and the subsequent activities induced by it are labor, capital, and land.

(1) Labor receives increased income due to increased levels of economic activity. Some of this labor was previously unemployed and some migrated into the State due to this activity.

(2) Capital inputs come from two sources: public and private. Private capital receives income due to higher economic activity, although some of this increased income is received by out-of-state owners. Public capital includes the schools, roads, sewage facilities, etc., necessary to maintain public services at acceptable levels in the face of the increased economic activity.

(3) Land inputs also come from private and public sources. Private land-owners, both in-state and out-of state, receive increased income from the increased economic activity. Public land, or, more generally, publicly owned resources, such as waterbottoms, barrier islands, reefs, and sensitive shoreline are used in the resulting natural gas activity.

k. Increases in local and regional population and business activity (caused by OCS operations) cause corresponding increases in a demand for public and private services and facilities such as education, potable water supply, energy services, police and fire protection, transportation, recreation, sanitary sewage and solid waste disposal and housing. Such population and business activity fluctuations cause deficiencies in service levels and adversely effect the quality of life and even the physical well-being of the population at times. The severity of these deficiencies are directly proportional to the total increase in demand and the length of time over which the increase occurs, and inversely proportional to the capacity of existing service systems and facilities to provide for increased demands without lowering designed service standards to the point where quality of service is considered unacceptable by the public. The increase of demand for public services calls for expenditures in excess of current revenues, requiring increases in taxes or other public revenue producing measures.

1. The Louisiana coastline is a high hazard area particularly with respect to hurricanes and storm surges. From its inception and continuing to date, the activities associated with OCS gas marketing operations have significantly increased populations in Louisiana's coastal areas. As a result, the State has been required to furnish substantial protections for the inhabitants of the coastal area from natural disasters. Extensive and increasingly costly highways and transportation related facilities have been required to ensure egress and access to the coastal areas. These transportational links serve to perform necessary functions for support of facilities located in the coastal zone and to provide emergency egress in the case of a man-made or natural disaster. The construction of needed highways and bridges, which can be directly correlated to onshore support of OCS gas activities has, alone, created substantial financial burdens for the State. Viewed in connection with all other public services required from the State of Louisiana for onshore support of OCS gas activities the costs to the State far exceed revenues generated.

B. RELATION OF TAX TO SERVICES PROVIDED

85. The second criteria is that there be a factual determination as to whether or not a substantial relationship exists between the tax and services provided by the State with respect to activities associated with the taxed uses. In order to adequately assess the relationship between Louisiana's First Use Tax and services provided for the benefit of the owners of the raw natural gas, it is necessary to evaluate the provided services.

a. Since the inception of offshore drilling in 1947 the State has experienced significant and onerous burdens for which comparatively little, if any, compensation has been received.

b. The effects experienced from onshore support of OCS related activities are cumulative and synergistic in nature, progressively increasing and expanding as OCS activities correspondingly increase and expand. There is an irrevocable interrelationship between labor, capital and land requirements, which both specifically and collectively create tangible hardships on the State of Louisiana.

c. The following materials briefly summarize the services provided by the State of Louisiana which are directly related to onshore impacts of OCS natural gas marketing activities. These hardships have been cumulatively impacting the State of Louisiana for over thirty years and progressively increase as OCS activity expands.

(1) Since the inception of OCS gas operations, population trends in Louisiana have shown an ever-increasing coastal population growth specifically related thereto. In the midst of irreplaceable marshes and wetlands have grown substantial population centers whose very existence is irrevocably tied to OCS gas operations. These once remote wilderness areas rapidly evolved into the hub of service and support activities for OCS operations. Thousands of laborers and their families, together with skilled workers and professionals, were infused into a coastal area whose public facilities were wholly inadequate to meet the demands of an ever-increasing population. Operation of a typical exploratory drilling rig requires about 110

workers, and each such rig can drill from four to six wells per year. The exploratory phase requires the largest number of transient employees because of the skills needed and the temporary nature of the work. Notwithstanding the transient status of employees, the State is still required to provide substantial services for these employees. Development rigs have similar requirements with crews of about 65 workers per rig as typical. Employment needed for the production phases will steadily rise in direct relation to the number of productive wells and platforms brought into service, peaking near the end of the development phase.

(2) Concurrent with the offshore operations are pipe laying operations conducted on the OCS and in State waters and wetlands. A pipe laying barge employs about 170 workers, about one third of which are unskilled and will be recruited locally, if available. Like workers on drilling rigs, most of the skilled pipe laying workers migrate with the vessel from job to job.

(3) A significant number of workers are employed in construction and expansion of raw gas processing facilities, onshore and overland transportation facilities, and onshore supply facilities directly associated with the marketing operations. A large number of support services directly related to OCS gas operations require not only a significant employee population, but, additionally, building space or sites, highway access, and in many cases inland water dock sites with ocean access. These support services include shop building facilities, platform and rig construction facilities, drilling mud suppliers, cement and structural material suppliers and manufacturers, logging and perforating services, wellhead equipment services and personnel, downhold equipment and personnel, diving services, tool sale and rental tool companies, and a full spectrum of pipeline, processing plant, and rig related industries which supply equipment, personnel, crewboat service, helicopters, catering and waste disposal.

(4) Increases in local and regional population and business activity cause corresponding increases in the

demand for public and private community services and facilities. The services include:

(a) education: during the initial phases of OCS operations, the Louisiana coastal communities had no educational facilities or only the most limited facilities as were required to meet previous populations. The substantial and rapid shift of population centers to the Louisiana coast has created a demand for new and/or expanded educational facilities including: physical structures, land area and publicly salaried personnel. Financial outlays for education have significantly exceeded available revenues and have substantially contributed to the State's bonded indebtedness.

(b) potable water supply: despite a surrounding area which contains some of the most valuable water resources in the nation, the availability of water safe for public use and consumption is limited. Extensive networks of piping, wells, and water purification and treatment facilities are mandatory. These facilities must be expanded and modernized as demands increase with population infusion.

(c) energy services: due to the wilderness nature of the coast, prior to the initiation of OCS-related activities, energy services were completely unavailable in many areas of coastal Louisiana. The provision of these services has been accomplished through a combination of publicly and privately financed facilities which, as with each other facility, must be constantly expanded and modernized to meet ever-increasing needs.

(d) police and fire protection: increased police and fire protection is an integral part of population growth. Police and enforcement authorities must be provided and funded in sufficient numbers to provide services to residents and transients alike. As a consequence, a significant portion of the services provided afford protection for individuals who infuse little revenue into the State's economy. Included in these services may

often be the requirement for sophisticated and expensive equipment to control both onshore and water-borne activites.

(e) health services: a broad spectrum of health services is associated with population growth incident to OCS gas activities and their onshore related activities. In addition to the establishment of obvious services such as hospitals, clinics, ambulance and emergency service, there is a mandate that State funded health care be provided for those individuals who are not financially capable of affording necessary health care. As with police protection, the use of health care services is not limited to residents and a significant portion of the services provided are utilized by transients who infuse little money into the State's economy.

(f) transportation: the vast majority of activities and operations involved in OCS gas development and production are located in coastal areas which are subject to natural disasters such as storm surges and hurricanes. It is necessary that road and highway facilities be provided to allow the transportation of necessary goods and supplies to OCS related activities. It is additionally necessary that these roadways be capable of allowing emergency evacuation during the time a natural disaster would approach the coast. Construction of highways in coastal marshes and wetlands is among the most expensive roadway construction in the world the cost of which must be borne by the State of Louisiana. Highways must often be elevated, and require the construction of bridges or locks to transgress navigable waterways.

In addition to construction of roadways, transportational facilities must be provided by way of buses or other common carriers to allow travel by individuals who lack their own mode of transportation.

(g) recreation: as part of the overall scheme of public services provided to the citizens of the

State, the State provides recreational areas including: boat ramps, parks, golf courses, public swimming facilities, zoos, and man-made impoundments and reservoirs.

(h) housing: possibly the greatest shortage in all available services is that of housing. The coastal Louisiana area is not topographically situated for rapid housing development. The Louisiana marshes, swamps, and wetlands inhibit construction. To allow development the swamp or wetland area must be completely destroyed and sufficient community roadways must be constructed to service a new development.

(i) sanitary sewage and solid waste disposal: in connection with housing expansion, and, similarly, in industrial or commercial sites, extensive sanitary sewage facilities must be provided. Associated with these facilities are the necessary treatment sites and solid waste disposal sites. Additionally, sanitary land fills and refuse sites must be provided which increase loss of wetlands area and burden the financial structure of the State. Further, federal law prohibits waste disposal from the OCS platforms and this refuse must be returned to shore for proper disposal.

(5) As the demands for the above enumerated services increase, the demands on public capital increase. The demands for public capital resulting from OCS natural gas activity have two sources: population demand on public capital, and facility demand on public capital. These public capital costs consist of annual capital operating cost and annual interest costs on public debt. Annual cost must be absorbed by the State and local governments as expenditures are made. Debt costs will continue after the OCS activity declines, imposing a fiscal burden on the remaining population which must be borne notwithstanding the absence of income from OCS related activities. In addition, to the extent that the activity results in the shift of population within the State, previous capital used must be paid for by remaining residents in the face of

a declining tax base; and new capital must be created at the destination locations of the population shifts. In this sense, there is a double capital cost imposed on citizens of the State of Louisiana.

(6) The facility demand on public capital is directly tied to the unusual public capital necessity for primary and secondary OCS natural gas activities. These include highways, sewage treatment, and other services which have greater demands placed on public facilities than would be experienced through other forms of business activities.

(7) A particular cost to the State is the construction, maintenance, and supervision of port and port facilities related to OCS gas marketing activities. An integral part of this service includes the creation and maintenance of channels and includes the requirement for services of enforcement authorities to oversee port operations. Since natural gas operations on the OCS are supported almost entirely by water borne commerce, the port facilities provided must be regularly expanded to meet ever increasing needs of the industry.

(8) The third aspect of costs to the State is that related to land. The uses and loss of land attributable to OCS gas operations and related onshore activities are inextricably intertwined with environmental impacts flowing from OCS gas marketing activities. Louisiana's environmental setting and ecological stability is directly and indirectly adversely affected by activities associated with gas operations and related activities. This effect is demonstrated by the following facts:

(a) Barrier islands, reefs and shores: Louisiana's barrier islands, associated marshlands, reefs, water bottoms, and shores are one of the most significant and dynamic coastal features in the United States. Over 2,500 barrier islands buffer Louisiana's near sea-level coast from storm surges and protect the marshland - estuarine intertidal zone from direct impact from the Gulf of Mexico. Within the intertidal zone the shallow waters and marshlands form highly productive

environments for numerous flora and fauna species. Included within the estuarine areas is the most productive fisheries zone in the United States. Without the barrier islands, the productive habitats and estuarine areas would not develop. Barrier island changes, whether natural or man-made, affect the viability, survival and robustness of dependent life systems.

(b) Louisiana's barrier islands differ in origin and characteristics from those along the Atlantic coast and other portions of the Gulf coast in that they are directly related to Mississippi River deltaic sequences and processes. The islands are far removed both vertically and horizontally from mainland rock sediment sources and are set in an area that is undergoing regional and local subsidence. In addition, eustatic sea level changes have occurred at irregular intervals for the last several decades raising the water table and, subsequently, lowering available above-sea-level land masses on the barrier islands. Source and quantity of sand available for reworking into beaches and barrier islands are limited. Sediment supply in the lower regions of the Mississippi River is restricted to fine grained material. While the fine grained material enhances the viability and robustness of marine life, these riverine deposits are sensitive and vulnerable to man-made changes. Man-made channels through or adjacent to barrier islands for the purpose of pipelines or navigation channels have, and continue to, cause extensive damage to the State's barrier islands. As a result, the delicate estuarine areas protected by these barrier islands are endangered and, absent extensive restorative measures on the barrier islands, face eventual destruction.

(c) The barrier islands and their associated intertidal marshland - estuarine environments form the most dynamic and complex physical/marine life system in the northern hemisphere. Hydrography is among the most important of parameters in determining the viability of marine

life systems. Numerous inlets and associated bars, spits and shoals form discrete niches for the propagation of marine life. Tidal channels that drain and flood the estuaries and marshlands form the arteries of nutrient transport and water mixing mandatory for continued marine species growth. Under natural conditions, the natural functioning of barrier islands and their associated estuaries can evolve in unison and change through time without significant deterioration of marine life populations. However, the intensive channelization associated with OCS gas marketing has created an imbalance in this sensitive system and threatens destruction of the entire system.

(d) Land loss associated with man-made channelization is not limited to the original parameters of the channel. Natural forces and wave wash from water borne craft accelerate erodive forces on channel banks to widen a canal at a rate which may equal or exceed 1-1/4 feet per month. In that a significant number of these channels were dredged with the earliest beginnings of the OCS gas industry over thirty years ago, the cumulative impact of erodive forces on Louisiana's barrier islands and coastal marshes have been enormous.

(e) Detailed inventories of land loss and erosion related to channelization have indicated that land is being lost in the Louisiana coastal zone at the rate of 16.5 square miles per year. Similar studies have shown the total rate of wetland loss alone attributable to channelization for brackish marsh across the State is 3,320 acres per year; 1,704 acres per year for saline marsh; 1,212 acres per year for fresh marsh; and 541 acres per year for swamp forest.

(f) The land loss associated with channelization attributable to OCS gas marketing operations is but one phase in the progressive destruction of Louisiana's delicate ecosystem. The productivity of a given estuary system is directly pro-

portional to the configuration of its component environmental parts and the kind and intensity of processes operating the system. Estuaries in coastal Louisiana owe their high productivity to the large areas of marshes and swamps fringing open water bodies; to the highly irregular shorelines providing thousands of miles of land-water contact and broad brackish water zones; and to protections afforded from Gulf waters by barrier islands. Under natural conditions the productivity of the entire estuarian zone will remain high. However, recent studies of the Louisiana environmental zone indicate that, in general, canals and pipeline trenches have drastically increased rates of deterioration and may contribute to the eventual collapse of the estuarian systems along the Louisiana coast. Without intensive and expedient restorative measures on Louisiana's coast, this probability of estuarian collapse will become an eventuality.

(g) Interrelated with land loss from channelization is the destruction and loss of wetlands, swamps, and marshes from increased urban and industrial expansion. These activities in Louisiana's coastal areas have necessitated the filling of thousands of wetland and marsh acres for the construction of housing, industrial sites, and commercial sites. This filling process has created an irreversible impact on Louisiana's irreplaceable resources. Natural tidal marshes have been evaluated in monetary terms. By-production (fisheries, etc.) on a per acre basis yield a value of $100+ per year. More intensive uses such as oyster aquaculture, which preserve many of the natural functions of the marsh -estuarine ecosystem, have a potential up to $1,000 per acre per year. The potential for waste assimilation is much higher; about $2,500 per acre per year for tertiary treatment. Summation of the noncompeting uses approaches an ecological life-support value of about $4,000 per acre per year, based on the gross primary productivity (in energy terms) of the natural marsh,

using a conversion ratio from energy to dollars based on the ratio of Gross National Product to National Energy Consumption. When these annual social values of $2,500 to $4,000 are income capitalized the estimated total social values are substantial for any given acre. The loss of this acreage from OCS gas related onshore activities must be borne by the State.

(h) Vegetation community changes measured over a ten year period, 1968 to 1978, indicate salt water incursion trends in Louisiana coastal marshes. These trends show conversion of 240 square miles of brackish marsh communities to saline communities; 352 square miles of intermediate to brackish marsh; 282 square miles of fresh to intermediate marsh; and 29 square miles of fresh to brackish marsh. Each of these changes is accelerated as a result of gas pipeline activities and lowers productivity of the affected areas.

(9) Additional costs to the State of Louisiana related to pipeline activities can be ascertained by calculation of lost revenues to the State resulting therefrom. Diminution of fisheries and wildlife resources is directly attributed to channelization. Additional losses can be found in other operational features of raw gas transport and marketing activities and these detrimental impacts include:

(a) The physical presence of platforms affect both commercial fishing and navigation. Platforms adversely affect commercial fishing by removing open waters and sea floor from use by purse seiners and trawler nets foul. The flotsam and jetsam from OCS operation also generate adverse impacts on commercial fishing similar to those caused by platforms. Platforms also interfere with coastal shipping traffic and increase the possibility of collisions between ships and between ships and platforms. Between 1974 and 1977, fifteen vessels collided with structures in the Gulf of Mexico and such collisions create the imminent peril of significant oil and gas spills.

(b) For the period 1956 to 1973 there were 38 gas leaks associated with well blowouts during OCS operations in the Gulf of Mexico. Eleven of these incidents in the Gulf involved fires and five were associated with oil or condensate spills. The duration of these blowouts ranged from two hours to over seven months.

(c) Spills are recognized as the most common cause of environmental pollution associated with offshore mineral activities. All phases of petroleum development, from exploration to production, have the potential for causing or contributing to spills. Thirty major spill incidents (238 barrels or more spilled) occurred in the OCS area of the Gulf of Mexico between 1964 and 1978. From these 30 incidents, 347,195 barrels of oil were spilled. Damages resulting from these spills range from negligible to significant destruction of coastal marine life affected by the spills.

(d) Blowouts: Wells have blown out of control during drilling operations, completion and production. Statistics indicate that an average of one blowout occurs for every 245 wells drilled, spilling approximately 1,294 barrels each occurence.

(e) OCS mineral exploitation activities introduce various stresses to, coastal fishery organisms. Basically, two types of effects can be expected to occur: lethal and sub-lethal effects. Lethal effects are those which cause immediate mortality. Lethal effects can be caused by toxicants or from smothering and suffocation. Sublethal effects are those which do not cause immediate mortality, although death may follow at some later date. These effects may be acute, that is, a single sudden stress or chronic stresses recurring frequently over extended time periods. The manifestation of impacts on fishery resources is alteration in stock abundance and species composition. The cause of the above effects can take two pathways: primary effects and secondary effects. Primary effects are those which affect those organisms comprising the

fishery directly, without intermediate steps. Secondary effects are those which impact other components of the ecosystem or interfere with ecological relationships, the end result of which is an altered fishery stock. Examples of secondary effects are habitat alterations, destruction or critical components of trophic structure, bioaccumulation, bioconcentration and biomagnification. Typically, the impacts of secondary effects surface at some later time. The fisheries of the Gulf of Mexico are dominated by estuarine-associated species, and estuaries and coastal areas are more sensitive to spills and related perturbations than the open ocean.

C. APPORTIONMENT

86. A third criteria set forth for determining the constitutionality of a tax under the Commerce Clause is that the tax be fairly apportioned. There is no danger of multiple taxation because Louisiana taxes only activities carried on within the State. The First Use Tax does not undertake to tax activities carried on outside of the borders of Louisiana. The tax imposed by the State is not out of proportion to what the taxpayers are doing in the State and to costs and burdens imposed on the State.

87. The raw gas transported into the State of Louisiana from Federal OCS gas operations is *not* the same product which is piped from Louisiana gas processing plants to consumers out of State. Raw natural gas is a composite of hydrocarbons, corrosives, and inert ingredients including methane, propane, isobutane, normal butane, isopentane, normal pentane, ethane, hexane, water, sulphur, carbon dioxide, and nitrogen.

88. The raw gas has a BTU content that is neither desirable nor contracted for by the purchasers for distribution and public consumption. It is mandatory that BTU content of raw gas be adjusted to the standard marketable BTU level. Once the raw gas has been processed and refined, the gas delivered at the plant's tailgate is of proper BTU content and dryness, capable of economical long distance transportation to markets. The BTUs

are adjusted and the gas is dried to make it marketable and fit for transportation only once. No further activity of the nature taxed in Louisiana is required or necessary once the refined gas is delivered to the owners in Louisiana.

89. One hundred percent of the processing and refinement of raw natural gas piped onshore into Louisiana from Federal OCS lands occurs in Louisiana. It is impossible to sell, transport, process, or utilize raw natural gas after it has completed the uses taxed in Louisiana because the gas no longer exists in its original raw state. Similarly, the costs and burdens imposed on the State of Louisiana associated with onshore support activities related to marketing of raw natural gas through the processing phase are experienced only in Louisiana and cannot be imposed by any other State.

90. Costs to the State have historically, are presently, and will in the future exceed benefits received by the State. As each annual cost figure manifests itself, the cumulative disparity between costs and benefits is accentuated, particularly with respect to the irretrievable commitment of natural resources and the depleting character of the commodity.

91. The apportionment formula for calculation of proportional amounts of activity done within the State to the amount of tax collected is not nor need be mathematically exact.

92. Louisiana's First Use Tax is fairly apportioned to uses occurring in Louisiana, which cannot occur in another State. This includes:

a. the sale of raw natural gas prior to processing in Louisiana which cannot occur in another State;

b. the transportation in Louisiana to the point of delivery at the inlet of any processing plant in Louisiana which cannot occur in another State;

c. removal of component products or waste materials which cannot occur in another State once it has been done in Louisiana; and

d. transfer of possession or relinquishment of control of

the gas by the owner does not occur again until the gas is resold to local distributors or end-users.

93. The First Use Tax is levied solely on the local gathering system activities occurring exclusively and but once in Louisiana, all of which activities are a part of the processing, refining, marketing and transformation of raw gas into refined gas. The local taxable incidents are not integral parts of the flow of commerce, i.e., the transmission of refined gas from the tailgate of a processing plant to the ultimate consumer. The tax is not one which in form or substance can be repeated by other States. All events upon which the tax is conditioned occur in Louisiana and not elsewhere.

D. DISCRIMINATION AGAINST INTERSTATE COMMERCE

94. The last criteria is that the state tax be nondiscriminatory. An economic advantage existed in favor of marketing gas produced from the OCS prior to the imposition of the First Use Tax and against marketing of gas produced within the boundaries of Louisiana. A severance tax is imposed on Louisiana produced gas at the rate of seven cents per one thousand cubic feet, the same tax rate imposed upon owners of natural gas affected by the First Use Tax. No commercial advantage is granted to local business; owners, whether local or out of State, of natural gas are liable for the First Use Tax when a local taxable incident first occurs with respect to the natural gas; and owners, whether local or out of State, of natural gas produced in Louisiana are liable for the equivalent State severance tax. The tax rate is the same; equivalent taxation exists on domestic gas owners as is now imposed on owners of OCS gas.

95. Owners of natural gas who pay the First Use Tax do not pay a higher tax than those owners who pay the Louisiana severance tax. Owner A has 1000 MCF of OCS gas; Owner B has 1000 MCF of OCS gas and 1000 MCF of gas subject to the Louisiana gas severance tax; and Owner C has 1000 MCF of gas subject to the Louisiana severance tax. Owner A owes $70 of first use

tax; Owner B owes $70 of first use tax and $70 in severance tax; Owner B pays the first use tax and may claim a severance tax credit against a gas severance tax liability, but then he owes an additional and equivalent amount of taxes because the then untaxed domestic gas is subjected to a local use taxable under the First Use Tax; Owner C owes $70 in severance taxes. All three Owners have the same tax liability owed upon the use of the same volume of natural gas.

96. The First Use Tax does not tax uses of the gas or the business operations of the owners of natural gas performed or occurring in any other State. The First Use Tax falls uniformly on all taxpayers liable for the tax.

97. Without the First Use Tax, raw natural gas produced from the OCS and transported by gathering systems across Louisiana shorelines and barrier islands to processing plants located in Louisiana is ultimately converted from raw gas into a marketable commodity with an increased value and delivered to interstate transmission systems for resale and use without the owner bearing its fair share of the State costs incurred incident to affording services, protection, and repairing damage caused by onshore activities and impacts associated with essential marketing operations. The discrimination or disadvantage that has long been borne by owners and marketers of gas produced within the territorial boundaries of Louisiana is removed by taxing owners of gas which is similarly used in Louisiana, but who, prior to the First Use Tax, provided no direct compensation for the substantial benefits received.

98. The First Use Tax does not subject the owners liable for said tax to the burden of "multiple taxation." The "uses" once performed in Louisiana are not performed in another jurisdiction on the same gas.

99. The owner of gas who owes the First Use Tax may not, as a matter of public policy, contractually shift the tax to a party who receives no benefits of ownership or use of the refined gas. Purchasers of gas subject to Louisiana's severance tax may not contractually shift the tax back to the producer except to the ex-

tent of production retained by such producer. Taxpayers owing the First Use Tax and taxpayers owing a severance tax are treated equally as respects the burden of the tax.

100. Natural gas use which is exempt from the tax when applied in Louisiana to the drilling for or production of oil, natural gas and sulphur, to the processing of natural gas, or to the manufacture of fertilizer and anhydrous ammonia are deemed to be uses of significant state and national concern which fully merit the exempt status granted.

VI.

FACTS RELATIVE TO SUPREMACY CLAUSE ARGUMENTS

101. A variety of facts must be explored and developed in connection with the complainants' allegations that Louisiana's First Use Tax is unconstitutional as violative of the Supremacy Clause of the United States Constitution (Article VI, Clause 2).

A. THE ALLEGED ATTEMPT TO REGULATE GAS DEDICATED TO INTERSTATE COMMERCE

102. The First Use Tax is not imposed "on gas" but is imposed upon local activities or uses allowed or permitted by the owners thereof to be performed within the territorial limits of the State of Louisiana. The raw gas, the use of which is subject to the tax, is not moving in interstate commerce at the time the taxable incidences — uses within Louisiana — occur.

103. The regulatory authority of FERC over natural gas companies is imposed by federal statute which includes rate-making jurisdiction. The authority of FERC under its rate-making jurisdiction does not prohibit state taxation. Section 110(a) of the Natural Gas Policy Act of 1978 specifically recognizes and authorizes State taxation of natural gas as well as the related activities appertaining to the refining and marketing of natural gas.

104. The First Use Tax is not a tax on gas dedicated to interstate commerce but rather upon the uses of the gas within Louisiana. These uses may be considered a cost of the service in preparing the raw natural gas as a marketable commodity which is ultimately consumed in plaintiff states.

105. Only the Commission may authorize a cost of service to be passed on to consumers (Section 4 and 5 of the Natural Gas Act and Section 110(a)(2) of the Natural Gas Policy Act). The First Use Tax does not require any person other than the owner of the gas subject to the tax to bear the burden of the entire tax.

106. Pursuant to application of the natural gas companies, FERC has published Orders 10, 10A and 10B allowing the direct pass-through of the First Use Tax to the ultimate consumers. This pass-through order does not affect the rate-making jurisdiction of FERC. The Orders were an exercise of the discretionary authority of the Commission upon application by the actual taxpayers.

107. The First Use Tax is imposed upon activities not under the rate-making jurisdiction of FERC and does not regulate gas dedicated to interstate commerce. The taxation of activities occurring within the State of Louisiana is not a regulation of the gas being put to a use in Louisiana.

108. The average residential consumer's maximum additional costs due to the pass-through of the First Use Tax, in the unlikely event that his entire gas supply consumed is derived only from the OCS, will be approximately eighty four cents per year. These figures conform to the concept of keeping the price of natural gas to the consumer at the lowest reasonable level.

109. Approximately ten per cent of the nation's gas supply comes from the Outer Continental Shelf and forms a part of the system-wide gas supply of a given pipeline, from which the rates and charges allowed by FERC are computed for that pipeline.

B. THE ALLEGED REPUGNANCY TO COMPREHENSIVE SCHEME OF FEDERAL REGULATION

110. Complainants allege that there exists a comprehensive federal regulatory scheme structured around the Natural Gas Act, Natural Gas Policy Act, Outer Continental Shelf Lands Act and Coastal Zone Management Act.

111. No federal regulatory scheme exists which prohibits State taxation of natural gas or the uses of natural gas. To the contrary, the cited statutory authorities specifically recognize and authorize State severance taxes as well as other State taxes and assessments relating to the cost of having a marketable gas available for consumption.

112. Federal regulation does not purport to regulate the processing of raw natural gas but, rather, mandates and approves the processing of this raw natural gas brought into Louisiana from the Outer Continental Shelf. The transportion of raw gas to the inlet of a processing plant is, likewise, not regulated.

113. The taxable incidents are solely local, occur one time only, and are necessary to the effectuation of the contracts of sale that are approved by the federal regulatory authorities. No regulatory authority cited by complainants prohibits Louisiana from taxing local activities occurring but once and then only within the territorial boundaries of the State of Louisiana.

114. Each of the statutorily enumerated uses has occurred in Louisiana for many years prior to the enactment of the First Use Tax. The statute merely identifies those local uses as appropriate incidents of taxation.

115. Each statutorily enumerated use was and is occurring consistently with certificates of public convenience and necessity issued by FERC under Section 7 of the Natural Gas Act. Each of the enumerated uses is essential in preparing the gas brought into Louisiana from the Outer Continental Shelf for the "first stages of distribution."

116. The First Use Tax does not mandate any action by natural gas companies as a result of the imposition of the First Use Tax. The economic desires of the natural gas companies induce them to apply to FERC for assistance.

C. THE ALLEGED CONTRACT NULLIFICATION

(Contract Clause [Article I, Section 10, Clause 1] U. S. Constitution)

117. Subsection C of Section 1303 of Title 47 of the Louisiana Revised Statutes provides:

> "C. In furtherance of the public policy and purpose set forth in Section 1301 of this part, and particularly Subsection C of said Section, this tax shall be deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas. Any agreement or contract by which an owner of natural gas at the time a taxable use first occurs claims a right to reimbursement or refund of such taxes from any party in interest, other than a purchaser of such natural gas, is hereby declared to be against public policy and unenforceable to that extent. Notwithstanding any such agreement or contract, such an owner shall not have an enforceable right to any reimbursement or refund on the basis that this tax constitutes a cost incurred by such owner by virtue of the separation of processing of natural gas for extraction of liquid or liquefiable hydrocarbons, or that this tax constitutes any other grounds for reimbursement or refund under such agreement or contract, unless there has been a final and unappealable judicial determination that such owner is entitled to such reimbursement or refund, notwithstanding the public policy and purpose of this part and the foregoing provisions of this Subsection C. In any legal action pursuant to this Subsection, the state shall be an indispensable party in interest."

118. To enable complainants to prevail in their arguments, there must be a showing that contracts are and were in existence which allow the owners of natural gas liable for the First Use Tax to claim a reimbursement or refund of such taxes from any

other party in interest, other than a purchaser of such natural gas. No such valid contracts were in existence upon the effective date of the tax.

119. Even if it could be established that such contracts are in existence, the First Use Tax is a proper and legal exercise of the police and taxing powers of the State. The exercise of the police power of the State, as reasonable and appropriate, justifies the abrogation of any such contracts.

120. The public purpose supporting the exercise of Louisiana's police power is as follows:

a. The conservation of natural resources is of vital concern to the present and future welfare of Louisiana and the nation, and it is the policy of the State of Louisiana, in the exercise of its police and taxing power, to prevent the physical and economic waste of its natural resources.

b. The imposition of a tax upon the severance of these natural resources from the soil and water of the State fails to prevent the economic waste of these Louisiana natural resources and will unfairly tax Louisiana producers in a discriminatory fashion, unless the State equally and uniformly taxes the introduction for the first time into the economy of the State natural gas which has not been otherwise or elsewhere subject to taxation by or within the United States.

c. The waterbottoms, barrier islands, and coastal areas within this State are also valuable natural resources, as they provide essential habitat for many forms of wildlife and aquatic life in Louisiana, help protect our coastline from erosion, and are of aesthetic, commercial and recreational value to the citizens of our state and nation.

d. Existing laws fail to provide protection for such valuable natural resources or compensation to the people of Louisiana for the necessary adverse effects caused by entry for use for the first time in Louisiana, under the protection of the State's laws, of natural gas which has not been subject to taxation otherwise or elsewhere by or within the United States unless the State levies an equitable tax thereon.

e. The First Use Tax is to require the exaction of fair and reasonable compensation to the citizens of Louisiana for the costs incurred and paid with public funds, which costs enure solely to the benefit of the owners of natural gas produced beyond the boundaries of Louisiana, although introduced into and used in the state, and to provide some measure of reimbursement to the citizens for damages to the State's waterbottoms, barrier reefs, and sensitive shorelands as a direct consequence of activity within the state associated with such natural gas by the owners thereof.

121. The public policy to prohibit the contractual shifting of the tax liability establishes several alternatives for the taxpayer:

a. The owner may decide to absorb the tax;

b. the owner may apply to the Federal Energy Regulatory Commission for a rate increase; or

c. the owner may apply to the Federal Energy Regulatory Commission to authorize the pass on of the tax to all subsequent purchasers, as a cost related to the marketer, of the gas, in excess of its approved rate structure.

122. The Federal Energy Regulatory Commission exercised its discretion and promulgated Orders 10, 10A and 10B, which allow the owners of natural gas liable for the First Use Tax to directly pass-through that liability to the ultimate consumers. This pass-through order does not affect the rate-making jurisdiction of FERC and is specifically authorized by federal law.

123. FERC Orders 10, 10A and 10B modify each and every contract previously approved by FERC under Sections 4, 5, and 7 of the NGA to delete the right of the owner to seek reimbursement or refund from any other party at interest other than a purchaser of the natural gas. These contract modifications or alterations are pursuant to federal law and became effective prior to the imposition of the First Use Tax.

D. THE OUTER CONTINENTAL SHELF LANDS ACT ALLEGATIONS

124. The OCSLA applies to that portion of the Outer Continental Shelf lying beyond the three-mile seaward boundary of Louisiana.

125. Each taxable incident for the First Use Tax is local in nature and occurs within the territorial boundary of the State of Louisiana.

126. No severance tax is levied upon raw natural gas produced from the Outer Continental Shelf and Louisiana collects no severance tax on raw gas produced in the Outer Continental Shelf.

127. The First Use Tax is not a tax on raw natural gas produced in the Outer Continental Shelf but, rather, the volume of gas used in Louisiana is the means of measurement for determining the dollar amount of liability to be assessed the owner of the raw natural gas who allows his gas to be put to a taxable use in Louisiana.

128. Raw natural gas, once severed from the Outer Continental Shelf, is no longer a portion of the Outer Continental Shelf but rather a commodity which comes into Louisiana by means of pipelines, which pipelines have damaged Louisiana's barrier islands, coastal waters and wetlands and exacerbates the loss of Louisiana acreage. Once this commodity leaves the Outer Continental Shelf (i.e., crosses Louisiana's boundary) it is no longer a portion of the Outer Continental Shelf subject to the provisions of the OCSLA.

129. State taxation laws levied directly on gas produced on the Outer Continental Shelf by any interior State — taxes on local distribution companies, sales taxes, use taxes, gross receipts taxes, etc. — are not and have not been considered as taxation laws applying to the Outer Continental Shelf in violation of the OCSLA.

130. The United States enters into leases of OCS tracts by means of public competitive bids. The amount of revenues received is dependent upon the bid per acreage and any bonuses and royalties to be received by the United States. The amount bid is not dependent upon the existence or non-existence of factors that may affect the ultimate price to be paid by consumers, but rather by the geology and economics; i.e., the speculation on size and location of reservoirs and the ability to realize a profitable return upon the capital investments necessary to produce the minerals.

131. The tax liability of OCS lessees, like all other businesses, is passed on to the ultimate end product consumer.

VII.

FACTS RELATIVE TO EQUAL PROTECTION ARGUMENTS

132. Complainants allege that the First Use Tax promotes various kinds of unequal treatment in violation of the 14th Amendment to the United States Constitution. The complainants have yet to demonstrate the factual validity of that allegation.

133. *All* owners of raw natural gas, as defined by the First Use Tax, wherein an identifiable first use of the gas occurs within the boundaries of Louisiana are liable for the payment of the First Use Tax. There are no exceptions.

134. The Severance Tax Credit Statute (R. S. 47:647) is available to any taxpayer paying the First Use Tax who also has a Louisiana severance tax liability. Owners of gas residing in any state other than Louisiana who have a severance tax liability on gas produced within the State and who have a First Use Tax liability as a result of allowing gas produced from the Outer Continental Shelf to be put to a taxable first use in Louisiana, has the right and privilege of claiming a credit against the severance tax owed if he has paid the First Use Tax.

135. Prior to the imposition of the First Use Tax, gas produced in Louisiana was subject to a severance tax at the rate of seven cents per MCF. After the imposition of the First Use Tax gas produced in Louisiana is still subject to a severance tax at the rate of seven cents per MCF.

136. Prior to the imposition of the First Use Tax, gas produced from the Outer Continental Shelf was not subject to Louisiana's severance tax or any other tax. Subsequent to the imposition of the First Use Tax gas produced from the Outer Continental Shelf is still free of Louisiana's severance tax and all other severance taxes.

137. Consumers using gas produced in Louisiana paid the Louisiana severance tax through the rate-making jurisdiction of FERC prior to the imposition of First Use Tax and pay this same tax since the imposition of First Use Tax. Consumers using gas produced from the Outer Continental Shelf did not pay a severance tax prior to the imposition of the First Use Tax and do not pay any severance tax as a result of the imposition of the First Use Tax.

138. Prior to the imposition of the First Use Tax, there existed a disparity and discrimination against gas produced in Louisiana and in favor of gas produced from the Outer Continental Shelf.

139. Consumers in Louisiana, as well as those outside of Louisiana, purchasing Louisiana gas were discriminated against because gas produced in the Outer Continental Shelf was not subject to any tax.

140. Prior to the imposition of the First Use Tax the uses statutorily defined as local taxable incidences were occurring to gas produced in Louisiana and produced from the Outer Continental Shelf. Subsequent to the imposition of the First Use Tax these uses still occur to gas produced in Louisiana and gas produced from the Outer Continental Shelf.

141. The First Use Tax rate is seven cents per MCF, which is equivalent to the Louisiana severance tax, and consumers using

gas produced from the Outer Continental Shelf now ultimately pay the same price for gas that is produced in Louisiana. Whether consumers reside in Louisiana or in a sister state they now pay the same price for natural gas consumed regardless of the location of the production of the gas.

142. The Tax Credit for Electric and Natural Gas Service (R.S. 47:11) is available to every appropriate entity owing any tax or combination of taxes, other than severance taxes, to the State of Louisiana upon showing that fuel costs for electricity generation or natural gas distribution or consumption have increased as a direct result of increases in transportation and marketing costs of natural gas delivered from the federal domain of the outer continental shelf and upon which such entities are dependent for a portion of their supply.

143. This particular tax credit does not relieve the customers — end users for residential, commercial or industrial purposes — of paying the First Use Tax as passed on to them by the local distribution systems.

144. Any qualified entity owing taxes to the State of Louisiana may claim the credit. This is true for non-residents, as well as residents of Louisiana, if they owe taxes to the State of Louisiana.

145. This tax credit is not to relieve Louisiana entities from paying the First Use Tax but rather grants them a tax credit as a result of any increased transportation and marketing costs of natural gas delivered from the federal domain of Outer Continental Shelf. The need and necessity of such credit is readily shown to be because of the dependency of these entities on Outer Continental Shelf gas and a means of helping these companies maintain available public services.

VIII.

FACTS RELATIVE TO IMPORT/EXPORT CLAUSE ARGUMENTS

146. Complainants allege the First Use Tax violates the import/export clause of the United States Constitution, Article I, Section 2, Clause 10. That allegation has yet to be supported by factual proof.

147. The First Use Tax is not imposed upon natural gas imported into the United States or natural gas exported from the United States. Natural gas produced from the Outer Continental Shelf and transported into Louisiana is not gas imported from a foreign country nor an import within the meaning and ambit of Article I, Section 2, Clause 10, of the United States Constitution.

148. Raw natural gas, on which no severance or production tax is paid or due, transported into Louisiana, comes from the subsoil and seabed of the continental shelf contiguous to the coast of the United States and the first use thereof in Louisiana subjects the owner of the raw natural gas to the First Use Tax liability. Said raw natural gas is not an import and is not subject to the levy of a federal import tax.

149. Mexican gas that may come into Louisiana is an import subject to the levy of a federal import tax and the first use of such gas in Louisiana is not subject to the First Use Tax. The same applies to Canadian gas or any other gas produced outside the territorial bounds of the United States and not from the subsoil and seabed of the continental shelf contiguous to the coast of the United States under the jurisdiction and control of the United States government.

IX.

FACTS RELATIVE TO JURISDICTIONAL, STANDING AND PRUDENTIAL CONSIDERATIONS

150. The facts alleged in the complaint filed by the plaintiff

States do not state a cause of action within the original jurisdiction of this Court.

151. The plaintiff States lack standing to invoke this Court's original jurisdiction since the facts alleged in the complaint demonstrate that they are representing and asserting only the interests of the private parties who are subject to the imposition of Louisiana's First Use Tax. The facts alleged in the complaint further demonstrate that the interest asserted by the plaintiff States, for themselves as gas consumers and as *parens patriae* for all gas consumers in their respective jurisdictions, is at most an indirect one.

152. The plaintiff States do not have any direct interest in the subject matter of this original action, and they have suffered no direct injury in fact, caused by the State of Louisiana.

153. Louisiana's First Use Tax is not imposed upon out-of-state consumers or upon any refined OCS gas that they may consume. Louisiana is in no way responsible for the action of the taxpayers in securing FERC's authorization for passing on the cost of the use tax to the ultimate consumers of refined OCS gas.

154. The interstate pipeline companies, upon whom the Louisiana use tax is imposed, are fully capable of defending their own direct interests and in asserting all the constitutional objections to the Louisiana use tax which the various complainants seek to raise before this Court. Those interstate pipeline companies have in fact instituted appropriate tax refund proceedings in the Louisiana state courts, wherein they have amply asserted their direct interests and wherein they can obtain a speedy resolution of those constitutional objections. Any such resolution by the Louisiana courts is of course subject to review by this Court in exercise of its appellate jurisdiction.

All of the above and foregoing is thus respectfully submitted.

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CERTIFICATE OF SERVICE

I, ROBERT G. PUGH, one of the attorneys for the State of Louisiana in the above-entitled proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 15th day of April, 1980, I served copies of the foregoing *Proffer of Proof of State of Louisiana to the Special Master* by mailing copies thereof in duly addressed envelopes, with postage prepaid, to:

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MOTION FILED
DEC 5 1980

No. 83, Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

STATE OF MARYLAND, *et al.*,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

ON THE REPORT OF THE SPECIAL MASTER
DATED SEPTEMBER 15, 1980

MOTION OF PIPELINE COMPANIES FOR LEAVE TO FILE REPLY TO LOUISIANA'S EXCEPTIONS AND MEMORANDUM REPLY

[Counsel listed inside front cover]

December 5, 1980

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STATE OF LOUISIANA,

Defendant.

ON THE REPORT OF THE SPECIAL MASTER
DATED SEPTEMBER 15, 1980

MOTION FOR LEAVE TO FILE REPLY TO LOUISIANA'S EXCEPTIONS

The pipeline companies, intervenor-applicants in this proceeding,[1] through their undersigned counsel of record respectfully move the Court for leave to file the attached Memorandum Reply to Louisiana's Exceptions to the instant Report of the Special Master.

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[1] Columbia Gas Transmission Corporation, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Florida Gas Transmission Company, Michigan Wisconsin Pipe Line Company, Mississippi River Transmission Corporation, Natural Gas Pipeline

[footnote continued]

As their support of this motion, the pipeline companies incorporate by reference the grounds set forth in their motion dated November 14, 1980 for leave to file exceptions to this report of the Special Master.

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December 5, 1980

Company of America, Northern Natural Gas Company, Panhandle Eastern Pipeline Company, Sea Robin Pipeline Company, Southern Natural Gas Company, Tennessee Gas Pipeline Company (a division of Tenneco Inc.), Texas Eastern Transmission Corporation, Texas Gas Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, and United Gas Pipe Line Company ("the pipeline companies"). The listing required by the recent amendment of the Court's Rule 28.1 is set out in the Appendix hereto.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 83, Original

STATE OF MARYLAND, *et al.*,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

ON THE REPORT OF THE SPECIAL MASTER
DATED SEPTEMBER 15, 1980

MEMORANDUM REPLY TO LOUISIANA'S EXCEPTIONS

Louisiana's exceptions to the Special Master's recommendations that its motion to dismiss be denied is based primarily on the claim that the Special Master ignores controlling, prudential considerations in light of an alleged availability of an appropriate State forum (Br., pages 11-29). In this regard, Louisiana urges that there is an alternative state forum available and hence *Arizona v. New Mexico*, 425 U.S. 196 (1976), calls for dismissal of this case.

However, one striking difference between this proceeding and the *Arizona* case is that the latter case was

decided on the motion for leave to file whereas here this Court has already accepted jurisdiction by order issued June 18, 1979, and during the nearly 18 months which have elapsed since that time, significant proceedings have been conducted before the Special Master appointed by the Court. As a result, there are pending before the Court the Master's recommendations with regard not only to Louisiana's motion to dismiss, but also with regard to motions for judgment on the pleadings as well as motions for leave to intervene filed, *inter alia*, by the United States and the pipeline companies. Should the Court agree with the contentions of the plaintiff States, the United States and the pipeline companies that judgment on the pleadings may be granted without evidentiary hearings, that would be the end of the case.

The state court proceedings, by contrast, have been virtually dormant for the past 18 months with the exception of a recent flurry of activity by Louisiana, apparently designed to bootstrap its contentions here, that this Court should now refrain from exercising its jurisdiction in deference to the state court proceedings.[1]

---

[1] As Louisiana noted (Br., pages 9-10), seven separate state court proceedings in which the constitutionality of the tax is at issue are pending in Louisiana. The pipelines are parties in the first of these, *Edwards, et al. v. Transcontinental*, brought by officials of Louisiana seeking a declaratory judgment of constitutionality, and in one of the six other actions, which seek recovery of the tax paid and being paid under protest. Contrary to Louisiana's implication (Br., page 10), none of these proceedings has progressed significantly beyond the pleadings stage. Only recently, in October, 1980, did Louisiana move for consolidation of those actions, and filed a rule for the pipeline companies to show cause why the eight

[footnote continued]

No significant action has been taken to obtain a decision in any of the pending state court actions. In view of the important constitutional questions involved, it seems inevitable that the validity of the tax ultimately will be decided by this Court; and, if and when a decision by the state trial court is rendered, a great deal of additional time would expire before that case could reach this Court in the stage in which the instant case is now presented here.[2]

The prolonged delays which would thus ensue in reaching a definitive ruling on the controversy here involved constitute potent reasons against deferring the controversy to the Louisiana state courts. The huge sums involved (aggregating roughly a quarter of a billion dollars a year) and the wide-spread impact of the First Use Tax (affecting rates paid by millions of customers in some thirty states)[3] together with the importance of

---

sovereign states who are the plaintiffs in the action pending in this Court should not be "invited" to appear as intervenors in the declarartory action filed by the Louisiana officials. On November 10, 1980, the state court judge dismissed out of hand Louisiana's rule to show cause.

[2]Even if the case were on a "fast track" in the Louisiana state courts, and were disposed of summarily by the trial court, and then by direct review by the Louisiana Supreme Court through supervisory writ jurisdiction (assuming that court is willing to exercise its discretion and bypass the intermediate appellate courts), these proceedings and the subsequent appellate or writ process to this Court probably would consume in the order of two additional years.

[3]By comparison, the *Arizona* case involved far less money and its impact was only upon limited customers in Arizona. Moreover, in *Arizona*, the New Mexico law permitted utilities to contest the tax while withholding payment whereas here, the tax has an immediate impact. Louisiana law requires the pipeline companies to pay the First Use Tax and the pipeline companies are collecting the tax from their customers subject to refund.

the constitutional issues involved, all point to the need for expedition which clearly can be achieved only by the Court's continued exercise of original jurisdiction herein. As the Master observed (Report, page 20):

> While no great speed seems possible in a case of this magnitude and complexity, this Court can at least control the case and, if it desires, move it forward more speedily than would be possible in a trial and appeal procedure [in the state courts of Louisiana].

Indeed, over the past year and a half, the parties and prospective intervenors and *amici* have briefed exhaustively the legal issues believed to be dispositive of the whole case on the merits. It would be particularly inappropriate and unwise under these circumstances, even from a practical standpoint, to defer to the Louisiana trial court and start anew.

Louisiana is unable to show any possible prejudice to its case that would result from an early definitive judgment in the Court, especially when, as here, the issues of federal preemption and constitutionality are sharply drawn and squarely presented.

The pipelines accordingly submit that the Court should accept the Master's recommendation denying Louisiana's motion to dismiss.

Respectfully submitted,

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December 5, 1980

APPENDIX

Pursuant to Rule 28.1 of this Court, the pipeline companies submit the following:

1. Columbia Gas Transmission Corporation is a wholly owned subsidiary of The Columbia Gas System, Inc. The non-wholly owned subsidiaries and affiliates are:

Big Marsh Oil Company

2. Consolidated Gas Supply Corporation is a wholly owned subsidiary of Consolidated Natural Gas Company. There are no non-wholly owned subsidiaries or affiliates.

3. El Paso Natural Gas Company is a wholly owned subsidiary of The El Paso Company, The non-wholly owned subsidiaries and affiliates are:

El Paso Europe – Afrique, S.A.
Minera San Pedro Corralitos, S.A.
El Paso Polyoletins Company
Geonuclear Nobel Paso
Windjammer, Inc.
Desert America Insurance Agency, Inc.

4. Florida Gas Transmission Company is a subsidiary of The Continental Group, Inc. The non-wholly owned subsidiaries and affiliates are:

Teepak Produktie N.V.
National Cup & Container Co., Ltd.
Envolturas Industries S.A.
Continental Plasticos Ltda.
Shellmar de Colombia S.A.
Shellmar Embalagem Moderna S.A.
Shellmar Comercio E. Representacoes
Peachtree Generating Corp.
Fibro Tambor S.A. De C.V.
Metal Cleaning & Processing, Inc.

The Continental Group
Envases Generales Continental de Mexico S.A.
Compania de Envases, S.A.
Continental Can Hong Kong, Ltd.
NiHon Harrison, Ltd.
Brasflor-Comercio E. Industria de Subproductos de Madeira S.A.
Convertidora Venezolana de Papel
Continental Container Co., Inc.
Braskraft S.A. Florestal E. Industrial
Containers Limited
P.T. United Can Company Limited
Kuwait Metal Container Co., Ltd.
Continental Can Saudi Arabia, Ltd.
The Metal Box Company of India, Ltd.
Fabricana Boliviana de Envases Sociedad Anonima
Dominguez Continental S.A.
Industrias del Norte S.A.
Mill Paper Fibres Limited
The Continental Group European Industries S.A.
Elbatainer (U.K.) Ltd.
Centenera Fabricas Sudamericanas de Envases S.A.
Dominguez & Cia. Caracas S.A.
Industrias Reunidas S.A.
Continental Produtos Metalurgicos Ltda.
Metalurgica Matarazzo
Aktiebolaget Platmanufaktur
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Lawyers Title Insurance Corporation
Long & Melone, Ltd.
Sentinel Escrow, Ltd.
Lawyers Title Company of Idaho
Lawyers Abstract Company

5. Michigan Wisconsin Pipe Line Company is a wholly owned subsidiary of American Natural Resources Company. The non-wholly owned subsidiaries and affiliates are:

Great Lakes Gas Transmission Company

6. Mississippi River Transmission Corporation is a wholly owned subsidiary of Missouri Pacific Corporation. There are no non-wholly owned subsidiaries or affiliates.

7. Natural Gas Pipeline Company of American is a wholly owned subsidiary of Peoples Energy Corporation. The non-wholly owned subsidiaries and affiliates are:

The Peoples Gas Light and Coke Company
North Shore Gas Company

8. Northern Natural Gas Company is a division of Internorth, Inc. There are no non-wholly owned subsidiares or affiliates.

9. Panhandle Eastern Pipe Line Company has no parent. The non-wholly owned subsidiaries and affiliates are:

Natural Helium Corporation
LOGAS Development Company

10. Sea Robin Pipeline Company is an unincorporated joint venture owned 50% each by wholly owned subsidiaries and affiliates of Southern Natural Gas Company and United Gas Pipeline Company. See 11 and 17, *infra.*

11. Southern Natural Gas Company is a wholly owned subsidiary of Southern Natural Resources, Inc. There are no non-wholly owned subsidiaries and affiliates.

12. Tennessee Gas Pipeline Company, a Division of Tenneco Inc. has no parent company. The non-wholly owned subsidiaries and affiliates are:

Border Gas Inc. (Delaware)
Monroe Auto Pecas, S. A. (Brazil)
Onner do Brasil S. A. (Brazil)
Tenneco Corporation (Delaware)
Collins Pipeline Company (Delaware)
Kern River Canal and Irrigating Company (California)
MISTAL Inc. (Delaware)
Nuodex of Canada, Ltd. (Canada)
HT Gathering Company (Delaware)
T&M Terminal Company (Delaware)
Compania Financiera Case, S.A. (Spain)
Construcciones Agrometalicas Levante, S. A. (Spain)
D. A. R. France, S. A. (France)
Establissement Robert Bellanger, S. A. (France)
Lorenhausen Maschinenban AG (Germany)
Poclain do Brasil S. A. (Brazil)
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W. J. Bush and Company (Nigeria), Ltd. (Nigeria)
Turaco Nihausawa, Ltd. (Nigeria)
Arndale Fuels, Ltd. (United Kingdom)
Bracey Petroleum Products, Ltd. (United Kingdom)
Tenneco Oil Products, Ltd. (United Kingdom)
Intertrac Viehmann & Co. (Germany)
Tractortechnic Canada, Ltd. (Canada)
Stoco Mutual Water and Sewer Company (California)

13. Texas Eastern Transmission Corporation is a wholly owned subsidiary of Texas Eastern Corporation. The non-wholly owned subsidiaries and affiliates are:

Transwestern Pipeline Company
Millray, Inc.

14. Texas Gas Transmission Company has no parent company. It has no non-wholly owned subsidiaries or affiliates.

15. Transcontinental Gas Pipe Line Corporation is a wholly owned subsidiary of Transco Companies, Inc. The non-wholly owned subsidiaries and affiliates are:

Border Gas Inc.
Dixie Pipe Line Company
Trans-Jeff Chemical
C&T Pipeline Inc.

16. Trunkline Gas Company is a wholly owned subsidiary of Panhandle Eastern Pipe Line Company. See 9, *supra*.

17. United Gas Pipe Line Company is a wholly owned subsidiary of United Energy Resources, Inc. There are no non-wholly owned subsidiaries or affiliates.

No. 83, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

ON REPORT OF THE SPECIAL MASTER DATED SEPTEMBER 15, 1980

MOTION FOR LEAVE TO FILE AND REPLY BRIEF OF THE PLAINTIFF STATES

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January 9, 1981

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STATE OF RHODE ISLAND AND
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STATE OF LOUISIANA,

Defendant.

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MOTION FOR LEAVE TO FILE REPLY BRIEF OF THE PLAINTIFF STATES

The State of Maryland, the State of Illinois, the State of Indiana, the Commonwealth of Massachusetts, the State of Michigan, the State of New York, the State of Rhode Island and Providence Plantations, and the State of Wisconsin ("the plaintiff states"), by their undersigned attorneys, move the Court for leave to file the accompanying reply brief to the defendant's brief of December 5, 1980, and in support of this motion state:

1. On October 6, 1980, the Court ordered that the Report of the Special Master dated September 15, 1980, be filed and that oral argument be set in due course.

2. By letter dated October 16, 1980, the Clerk advised that while no provision had been made in the order of October 6, the Court had directed him to advise that exceptions and replies to them might be filed by November 14 and December 5, 1980, respectively.

3. Exceptions were timely filed by the plaintiff states and the defendant, as were replies to the respective exceptions.

4. The exceptions and replies might properly be viewed as the merits' briefs of the respective parties under subparagraphs 1 and 2 of Rule 35, in which event subparagraph 3 of Rule 35 would allow to be filed as a matter of right a reply brief of the sort this motion seeks leave to file, provided it were received no later than one week before the date of oral argument; however, it is unclear that Rule 35 is literally applicable in the present posture of the case, and thus it is appropriate for the plaintiff states to file this motion.

5. The accompanying reply brief, which is being received with this motion more than one week before the date of oral argument, should be of assistance to the Court, in a number of respects, in ruling on the exceptions of the plaintiff states to the Report of the Special Master:

(a) the reply brief provides a succinct and focused response to the defendant's fifty-six-page brief of December 5, 1980;

(b) the reply brief references and discusses the scholarly commentary that has recently appeared on the constitutionality of the First Use Tax, including the most exhaustive exposition to date, which did not appear until after

the plaintiff states filed their exceptions on November 14, 1980;

(c) an appendix to the reply brief, in chart form, collects numerous contentions of the defendant and references where they are dealt with in earlier opinions of the Court, the findings of the Special Master, or the other filings in this case;

(d) an appendix to the reply brief reprints, and thus makes available to the Court in a convenient form, the reply of the plaintiff states to Louisiana's proffer of proof to the Special Master, which proffer was itself reprinted as an appendix to the defendant's brief of December 5, 1980;

(e) an appendix to the reply brief reprints, and thus makes available to the Court in a convenient form, certified copies of the verbatim legislative history of the First Use Tax, which was originally provided to the Court in typescript form by the Solicitor General with his letter to the Clerk dated November 28, 1979.

WHEREFORE, the plaintiff states request that the Court enter an order granting them leave to file the accompanying reply brief, together with its appendices.

Respectfully submitted,

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ON REPORT OF THE SPECIAL MASTER DATED SEPTEMBER 15, 1980

REPLY BRIEF OF THE PLAINTIFF STATES

INTRODUCTION

More than fifty years ago, in a similar dispute between sovereign states that also involved a "matter of grave public concern" and the power of one state to impede the flow of natural gas to another, the Court recognized that,

"notwithstanding the importance of the question, its solution [was] not difficult." *Pennsylvania v. West Virginia*, 262 U.S. 553, 592, 596 (1912). Here, too, despite the many briefs written during this case's short history, the root issues remain simple and their solution clear.

In this reply brief, which responds to the defendant's brief of December 5, 1980, the plaintiff states will not dwell at length on each point raised by Louisiana.[1] Instead, the plaintiff states seek only to refocus attention on the real issue here — the facial unconstitutionality of the Louisiana First Use Tax — and the established principles that require its immediate invalidation.

ARGUMENT

NO EVIDENTIARY HEARING IS NECESSARY TO CONCLUDE THAT THE FIRST USE TAX VIOLATES THE SUPREMACY CLAUSE AND THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

No evidentiary hearing is needed to appreciate the plain language, obvious operation, and intended purpose of the First Use Tax. The scheme reaches beyond Louisiana's boundaries to tax Federal Outer Continental Shelf gas. The statute taxes the volume of interstate gas at a flat rate, seeks to require the Federal Energy Regulatory Commission to pass-through the tax to out-of-state consumers by declaring the tax a "cost" of marketing the gas and by preventing the pipeline companies from passing

[1] The defendant's latest filing is legally inaccurate in a number of significant respects. For the Court's convenience, Appendix A to this reply brief includes capsule responses to Louisiana's assertions with references to earlier discussions of them. *Infra* at 1a. Because the defendant has attempted to becloud matters further by reprinting its lengthy proffer to the Special Master, there also appears as Appendix B the reply filed by the plaintiff states. *Infra* at 1b.

back the tax to natural gas producers,[2] and totally insulates in-state interests by means of exemptions, exclusions, and tax credits.

An announced purpose of the tax is to exact from interstate natural gas consumers compensation for alleged damage to Louisiana resources, La. Rev. Stat. Ann. § 47:1301 (West Supp. 1980); Note, *The Effect and Validity of State Taxation of Energy Resources,* 58 Wash. U.L.Q. 345, 357-59, 361 (1980); Reply of Louisiana to Exceptions and Supporting Brief of Plaintiff States at 44 (Dec. 15, 1980), and the scheme is "the most recent step in Louisiana's continuing effort to press its claim to profit from the production of oil and gas off its coast." Report of Special Master at 25 n.16. In essence, the statute strives to take advantage of Louisiana's location as the avenue of Federal OCS gas to export the tax to out-of-state consumers. *See* B. Tauzin, *Louisiana's First Use Tax,* Proceedings

[2] The defendant's argument that it never intended to affect the Commission's decision on whether to permit pass-through of the tax is belied by the explicit legislative history (which Louisiana consistently ignores) on this point. *See, e.g.,* Hearings on H.B. 768, Senate Committee on Revenue and Fiscal Affairs (June 26, 1978) at 27 (Testimony of Mr. Tauzin) ("FERC is going to have to allow this particular tax to pass on through."), reprinted *infra* at 77c, 112c. (As a convenience to the Court, the verbatim transcripts of the legislative hearings on the First Use Tax are reprinted as Appendix C to this reply brief.) Moreover, the unwavering theme of the legislative history has been echoed by the sponsor and chief architect of the First Use Tax, as well as by others. *See* B. Tauzin, *Louisiana's First Use Tax,* Proceedings of the 72nd Annual Conference of the National Tax Association — Tax Institute of America 194, 195 (1979) ("The tax is assessed against the *owner* of the natural gas, who is required to pass it *forward* to the consumers rather than backwards to the producer, . . ."), Comment, *The Work of the Louisiana Legislature for the 1978 Regular Session — A Student Symposium,* 39 La. L. Rev. 101, 221 (1978) ("[T]he 'pass-through' provision . . . passes the cost of the tax on to consumers in other states, . . .").

of the 72nd Annual Conference of the National Tax Association — Tax Institute of America 194, 195 (1979).

No evidentiary hearing is needed to conclude that the First Use Tax interferes with the Commission's ratemaking responsibilities and, in particular, its authority over the determination of costs associated with the transportation and sale of natural gas.[3] Here, too, the verbatim legislative history speaks without contradiction. *See supra* at 7, n.2. *See also* Hearings on H.B. 768, House Committee on Ways and Means (June 5, 1978) at 12 (Testimony of Mr. LaBorde) ("If the first use tax passes, it's going to be a passed on tax, no question about it."), reprinted *infra* at 1c, 17c. Also, two commentators have so concluded after careful study. W. Hellerstein, *State Taxation in the Federal System: Perspectives on Louisiana's First Use Tax on Natural Gas,* Shell Foundation Lecture at Tulane University School of Law (Nov. 20, 1980) at 34-35; Note, *The Effect and Validity of State Taxation of Energy Resources,* 58 Wash. U.L.Q. 345, 362 n.102 ("The Louisiana tax interferes with Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717(f)(c) (1976).").

The defendant's proffered distinction between raw and refined gas and claim that processing defers the commencement of interstate commerce have been decidedly rejected by the Court, *California v. Lo-Vaca Gathering Co.,* 379 U.S. 366, 369 (1965); *Permian Basin Area Rate Cases,* 390 U.S. 747, 820 n.111 (1968); *Deep South Oil Co. v. FPC,* 247 F.2d 882, 888 (5th Cir. 1957), *cert. denied,* 355 U.S. 930 (1958), and are simply irrelevant. These matters certainly do not support the taking of evidence. Nor would an unprecedented examination of the Commission's ability

[3] It is clear that state taxing schemes are not immune from Supremacy Clause scrutiny. *See* Arizona Public Service Co. v. Snead, 441 U.S. 141 (1979); McGoldrick v. Gulf Oil Corporation, 309 U.S. 414 (1940). Moreover, cases of this sort may be decided summarily. *Id.*

to grapple with the First Use Tax tell the Court more than it already knows, that is, that the regulated or the beneficiaries of natural gas regulation will suffer as long as the First Use Tax remains in effect.

No evidentiary hearing is needed to conclude that the First Use Tax violates the federal ban on the application of state taxation laws to the Outer Continental Shelf. Indeed, the Special Master, albeit while apparently rejecting this Supremacy Clause claim, acknowledged that the "conflict between Louisiana's law and the Outer Continental Shelf Lands Act does not appear to require an evidentiary hearing" and that "[t]his is a legal question which can be answered by an analysis of the two statutes." Report of Special Master at 29. *See* Brief in Support of Exceptions of Plaintiff States at 23-26 (Nov. 14, 1980).

No evidentiary hearing is needed for the Court to find that the First Use Tax discriminates on its face against interstate commerce.[4] The total immunity of in-state interests from the tax eviscerates any claim that Louisiana could make that the First Use Tax is a "compensating" tax. *See* Hearings on H.B. 768, Senate Committee on Revenue and Fiscal Affairs (June 26, 1978) at 3 (Testimony of Mr. Tauzin) ("[T]he entire package . . . has been amended as far as we can practically go to guarantee against any impact upon producers and processors and people in this state who would otherwise possibly feel some impact from the imposition of the tax."), reprinted *infra* at 77c, 81c. As Professor Hellerstein has observed:

> [T]he [severance tax] credit destroys the symmetry between the tax treatment of gas extracted in

[4] *See* Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959) ("Nor may a State impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business . . . or by subjecting interstate commerce to the burden of multiple taxation.").

Louisiana and gas extracted offshore that the First Use Tax was purportedly designed to create.

The grant of a severance tax credit for First Use Taxes paid effectively removes the burden of the First Use Tax from gas extracted offshore to the extent that the First Use Taxpayer has severance tax liability. In substance, this means that gas extracted offshore and gas extracted in Louisiana will be treated the same for Louisiana tax purposes only when the First Use Taxpayer has no severance tax liability to absorb the First Use Taxes. In such cases, gas extracted offshore, like gas extracted in Louisiana, will bear a tax at the rate of seven cents per thousand cubic feet. In cases where the severance tax credit is available, however, this equality is eliminated. Gas extracted offshore and brought into Louisiana by a First Use Taxpayer extracting an equivalent amount of gas in Louisiana will in effect escape First Use Tax liability altogether. Gas extracted offshore and brought into Louisiana by a First Use Taxpayer without any Louisiana gas production, however, will bear the full burden of the First Use Tax. Equality is no longer "the theme that runs through all sections of the statute." [*Henneford v. Silas Mason Co.*, 300 U.S. 577, 583 (1937), the leading compensatory tax case.] Instead a distinct competitive advantage is created for gas subject to the First Use Tax when the First Use Taxpayer carries on mineral extraction activities in Louisiana. On its face, this competitive advantage seems vulnerable to a commerce clause challenge because it favors taxpayers with in-state activities. The Court has consistently invalidated as discriminatory taxes that provide a direct commercial advantage to those engaged in local economic activity. [*Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977).] Here an incentive is provided for First Use Taxpayers to undertake mineral extraction activities in Louisiana so as to minimize their effective First Use Tax burden and to compete on equal terms with other First Use Taxpayers whose First Use Tax burden has already been so minimized. The Court has explicitly condemned this type of incentive under the commerce

clause in both the tax and regulatory contexts. [*Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963).]

W. Hellerstein, *State Taxation in the Federal System: Perspectives on Louisiana's First Use Tax on Natural Gas*, Shell Foundation Lecture at Tulane University School of Law (Nov. 20, 1980) at 23-24. *See also* Note, *The Louisiana First-Use Tax: Does It Violate the Commerce Clause?*, 53 Tul. L. Rev. 1474, 1499 (1979) ("If one reads the first-use tax and the tax credit provisions together, it is evident that in-state energy production and, more importantly, some in-state private gas operations receive a significant competitive advantage. Clearly, even the most liberal reading of [*Department of Revenue of Washington v. Association of*] *Washington Stevedoring* [*Companies*, 435 U.S. 734 (1978),] would indicate that this is unconstitutional.").[5]

No evidentiary hearing is necessary to determine that in "actuality of operation" the First Use Tax discriminates against interstate commerce. In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69 (1963), this Court, scrutinizing a sales-use tax scheme, pointed out that use taxes, common to most of the states, could not be viewed in "isolation" but must be considered in "actuality of operation" in conjunction with the "whole scheme of taxation," including sales taxes. There may be cases where an evidentiary hearing is required to determine what the effects of a particular tax are "in actuality of operation." *Cf. Department of Revenue of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 751 (1978). However, it is clear that in adopting the "*actuality*

[5] Because on its face the First Use Tax scheme is discriminatory and outside the legal requirements of a compensating tax and because the "ongoing processing dispute," Report of Special Master at 28, is without relevance to this particular Commerce Clause inquiry, the Court can appropriately and immediately rule on this question of law.

of operation" phrasesology, the Court was not decreeing, as the Special Master here seems to have inferred, that an evidentiary hearing be held in every case to determine whether a tax is constitutionally discriminatory. All that the Court was doing in *Halliburton* was repeating the view that a tax can not pass or fail constitutional muster on the basis of labels and nominalism without consideration being given to the taxing scheme as a whole. *Halliburton* is no aberration. Rather, in recent years the Court has consistently directed this analysis in Commerce Clause cases. *See, e.g., Complete Auto Transit v. Brady,* 430 U.S. 274, 279 (1977) (consideration is to be given "not to the formal language of the tax but rather its practical effect"); *Colonial Pipeline Co. v. Traigle,* 421 U.S. 100, 115 (1975) (Justice Blackmun, joined by Justice Rehnquist, concur- (rejecting "taxation by semantics").

It certainly does not follow from this repudiation of overly abstract and unrealistic analysis that an evidentiary hearing is to be held whenever the constitutionality of a taxing scheme is challenged under the commerce clause. What *Halliburton* means here — and all that it means — is that the First Use Tax cannot be judged, as Louisiana would have it, by simply focusing on the tax as a complement to the Louisiana Severance Tax. Rather what must be considered is the parade of exclusions, credits, and exemptions contained in the First Use Tax and its companion Severance Tax Credit, which combine to protect and benefit Louisiana interests and discriminate against out of staters. As this Court found in *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977), no evidentiary hearing is necessary for this determination.

No evidentiary hearing is needed to find that the First Use Tax is not fairly apportioned and invites the risk of multiple burdens on interstate commerce. As Professor Hellerstein has cogently observed, "The First Use Tax is

not apportioned at all, let alone fairly apportioned to activities conducted by the taxpayer in the state, . . ." W. Hellerstein, *supra* at 8-9. *See* Note, *supra,* 53 Tul. L. Rev. at 1495-96.[6] The tax attaches a flat rate of seven cents per thousand cubic feet to the entire volume of natural gas and draws no distinction with respect to the eight widely varying "uses," either as to amount of the tax or the state services which are said to justify its imposition. Moreover, only a modicum of the proceeds from the tax are earmarked for the defendant's loudly-proclaimed environmental concern,[7] and the scheme evidences no interest in the environmental damage caused by in-state businesses, including those operating offshore within the three-mile limit. Indeed, the tax immunizes producers, who reason would suggest, contribute greatly to the complained of damage. Finally, all of the "uses" could occur in other states, even processing, which the case law holds not to interrupt commerce and which could just as well take

[6] The author of this note states:

> Applying the fair apportionment and sufficient relation to services provided tests to the language of the Louisiana First-Use Tax Act reveals clear constitutional problems. First, the tax is imposed at a flat rate of seven cents per unit, and flat rate taxes have traditionally been challenged as bearing no relation to the amount of activity within the taxing state. This is especially true when one considers that the same rate of tax is imposed on a variety of "uses," some of which take advantage of more state services than others. Thus, even under a liberal apportionment test, the tax might not pass constitutional muster. In addition, because a flat rate tax does not take into account the amount of activity within the state, there is the danger of multiple burden since many of the uses taxed are not strictly local and may occur in more than one state.

53 Tul. L. Rev. at 1495-96.

[7] The first $500 million dollars of First Use Tax proceeds are deposited into an Initial Proceeds Account for investment purposes. La. Rev. Stat. Ann. § 47:1351 (West Supp. 1980). Additional proceeds are to be disbursed in the following fashion: 75% for debt retirement and redemption; and 25% for barrier island conservation.

place elsewhere. Clearly, if fair apportionment has any meaning in Commerce Clause analysis, the First Use Tax, on its face, violates the requirement.

Louisiana's repeated attempts to convince the Court to accept the defendant's jurisdictional and prudential contentions, including those relating to abstention,[8] are cut from the same cloth. If these arguments were accepted, the Court, despite its original and exclusive jurisdiction, could *never* entertain an original action between sovereign states, *never* hold as a matter of law that a state taxing scheme offends the Supremacy Clause or the Commerce Clause, and *never* grant a motion for judgment on the pleadings. As the Court's own different experience and commonsense indicate, Louisiana's contentions are frivolous.

More than fifty years ago, in *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923), the Court pierced a similar veil of objections to confront and condemn one state's attempt to exploit its position with respect to natural resources. The present case warrants the same result. As the Court noted in *Georgia v. Pennsylvania Railroad,* 324 U.S. 439, 450 (1945) (citations and footnote omitted):

> The original jurisdiction of this Court is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between States . . . . Trade barriers, recriminations, intense commercial rivalries had plagued the colonies. The traditional methods available to a sovereign for the settlement of such disputes were

[8] Kentucky v. Indiana, 281 U.S. 163, 176-77 (1930), is dispositive of Louisiana's request for abstention. As the Court held there, "When the states themselves are before this court for the determination of a controversy between them, neither can determine their rights *inter sese,* and this court must pass upon every question essential to such a determination, although local legislation . . . may be involved." *Id.*

> diplomacy and war. Suit in this Court was provided as an alternative. . . .

Amidst growing national alarm over domestic shortages of affordable energy, Louisiana's statutory scheme betrays, on its face, the same attempts at parochial profiteering that the Federal Constitution was designed to prevent. This controversy between the plaintiff states and Louisiana invites the Court to address once again, in the first decade of the Nation's third century, the same constitutional issues present at the birth of the Republic. These primal questions — the role of federal law and freedom of commerce among the states — are uniquely suited for resolution by the Court. Under its ample precedents, Louisiana's commercial adventure can and should be found facially offensive to the Constitution's commands.

CONCLUSION

For these reasons, and for those appearing in their brief in support of exceptions and their brief in support of the motion for judgment on the pleadings, the plaintiff states urge that their exceptions be sustained and that the Court enter a decree granting judgment as prayed for in the complaint.

Respectfully submitted,

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APPENDIX A

Summary Responses of the Plaintiff States to the Defendant's Contentions

Many of the contentions made by the defendant in its brief of December 5, 1980, have already been answered authoritatively by decisions of the Court, findings of the Special Master, or earlier briefs of the plaintiff states. For the convenience of the Court, the plaintiff states provide below summary responses to these contentions with references to where they have been answered previously.

Contention of the defendant:	Response of the plaintiff states:
1. The plaintiff states do not seek relief for themselves or other natural gas consumers. Brief at 8.	1. Commission orders require the pipeline company taxpayers to refund the First Use Tax if it is held unconstitutional. Exceptions at 12-13 & 13 n.4.
2. The Eleventh Amendment prevents the plaintiff states from demanding refunds. Brief at 9-10.	2. The Eleventh Amendment does not apply to original actions between states. Reply to Exceptions at 7. *See also Principality of Monaco v. Mississippi,* 292 U.S. 313, 328-29 (1934).
3. The plaintiff states have not denied that Louisiana's state court tax refund procedure is an adequate remedy. Brief at 11.	3. The plaintiff states have no remedy in state court. Reply to Exceptions at 8-12; Report of Special Master at 17-18.
4. The plaintiff states have not denied that "the issues tendered here may be litigated" in Louisiana courts. Brief at 11.	4. The plaintiff states cannot litigate these issues in Louisiana courts. Reply to Exceptions at 11.
5. There is a "total identity" of the issues here and those raised by the pipeline companies in the state court tax refund cases. Brief at 11.	5. The constitutional issues in this case were known to be substantial during the legislative hearings on the First Use Tax and had been discussed by commentators before acceptance of this original actions; thus, it is not surprising that the pipeline companies are pressing similar issues.

Contention of the defendant:	Response of the plaintiff states:
6. The plaintiff states "have not met the extremely high burden of documenting the utility and propriety" of a decision on the pleadings. Brief at 14.	6. If the plaintiff states are correct as a matter of law in their contentions, considerations of "utility and propriety" are irrelevant to a decision in their favor. The Special Master expressly found that two of the issues presented could be resolved on the pleadings. Report of Special Master at 21 & 29.
7. The plaintiff states have not atempted "to show compliance with the accepted standards" for granting a motion under Rule 12(c) of the Federal Rules of Civil Procedure. Brief at 15.	7. The rule does not specify any standards for granting a motion for judgment on the pleadings; to the extent the defendant articulates a standard, Brief at 16, the plaintiff states have met it fully. Brief in Support of Motion for Judgment on the Pleadings at 39-41.
8. The plaintiff states have not pointed to a single material fact admitted by the defendant in its answer. Brief at 17.	8. None of the "facts" proffered by the defendant are material to the motion for judgment on the pleadings. *See* Reply to Defendant's Proffer and the appendix thereto. On the contrary, all of the material facts to its disposition are undisputed. *See* Response of Pipeline Companies to Defendant's Proffer pt. III.
9. Summary disposition should not be used to resolve "constitutional issues" of "high economic importance" or of "great economic importance." Brief at 18-19.	9. Many constitutional issues of national importance have been decided summarily, including cases involving the constitutionality of state tax schemes and those within the Court's original jurisdiction. *See, e.g., Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977); *South Carolina v. Katzenbach,* 383 U.S. 301 (1966).

Contention of the defendant:	Response of the plaintiff states:
10. Summary disposition is never appropriate in Supremacy Clause and Commerce Clause cases. Brief at 19-20.	10. The Court has decided otherwise. *See, e.g., Douglas v. Seacoast Products,* 431 U.S. 265, 271-72 (1977); *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977).
11. The Court may not invalidate a state law on the basis of its reading of the statute and legislative history. Brief at 21 n.14.	11. This is incorrect. The Court often invalidates a state law on the basis of its reading of it and its legislative history if that reading indicates the statute is unconstitutional or contrary to federal law. *See, e.g., Williams v. Rhodes,* 393, 23 (1968).
12. Summary disposition is never appropriate in original actions. Brief at 23-25.	12. The Court has decided otherwise. *See, e.g., South Carolina v. Katzenbach,* 383 U.S. 301 (1966); *United States v. Louisiana,* 363 U.S. 12 (1960); *United States v. Texas,* 339 U.S. 702 (1952); *United States v. Louisiana,* 339 U.S. 699 (1952); *United States v. California,* 332 U.S. 19 (1947); *Kentucky v. Indiana,* 281 U.S. 163 (1930).
13. The Special Master and the parties should be given some guidance from the Court on how these problems of statutory construction, interpretation, and application are to be developed and resolved. Brief at 25.	13. The facial unconstitutionality of the First Use Tax is apparent from the language of the statutory scheme and is confirmed by its legislative history; there is no necessity for the Court to comply with the defendant's request for an advisory opinion to the Special Master.

Contention of the defendant:	Response of the plaintiff states:
14. The legislative history of the First Use Tax discloses legislative motive but not legislative intent. Brief at 25 n.16.	14. Statements of the draftsman of a proposed bill as to his understanding of its nature and effect, made at committee hearings, have been accepted as indicative of legislative intent. *Davies Warehouse Co. v. Bowles,* 321 U.S. 144 (1944). *See also Stonite Products Co. v. Melvin Lloyd Co.,* 315 U.S. 561 (1942).
15. An authoritative construction of the First Use Tax by Louisiana courts is needed before the Court can decide this case. Brief at 26.	15. The defendant has offered no plausible construction of the First Use Tax that warrants further delay of this case in state courts; the language of the statutory scheme is clear and is confirmed by the verbatim legislative history.
16. Many of the OCS gas purchase contracts may reveal that the product purchased is refined gas, not unprocessed gas. Brief at 28.	16. The Special Master found that "FERC had previously accepted contracts that provided that the processing involved and the tax on it were properly considered costs of producing liquid and liquefiable hydrocarbons, not properly to be borne by consumers of the natural gas." Report of Special Master at 28. As a matter of law, processing does not interrupt the flow of natural gas in interstate commerce, and it is not relevant to resolving the Supremacy Clause issues.
17. Underwater pipelines have massive environmental impact on Louisiana shorelines. Brief at 30.	17. As a matter of law, protection of the environment will not justify a Supremacy Clause violation or discrimination against interstate commerce.

Contention of the defendant:	Response of the plaintiff states:
18. The interstate movement or transportation of natural gas "arguably commences at the tailgate of the processing plant." Brief at 33.	18. "In view of the continuous movement of the gas, this seems a doubtful interpretation, but it hardly helps Louisiana in any event since the movement from the outer continental shelf across the state boundary and up to the processing plant would itself seem to be an interstate journey." Report of Special Master at 32. *See California v. Lo-vaca Gathering Co.*, 379 U.S. 366, 369 (1965).
19. The Special Master recommended that an evidentiary hearing be held before any constitutional issues could be resolved. Brief at 34.	19. The Special Master stated that two issues could be decided on the pleadings. Report of Special Master at 21 & 29.
20. The Report of the Special Master supports the defendant's contention that "authoritative delineation of the meaning or scope of the First Use Tax statute by the Louisiana courts" is necessary in this case. Brief at 34.	20. This is not accurate. The Special Master rejected all of the defendant's jurisdictional, procedural and prudential objections, including the call for abstention. Report of Special Master at 10-20.
21. The plaintiff states "appear to have abandoned their 'flat prohibition' argument in their latest brief." Brief at 36.	21. The plaintiff states have not abandoned any argument. *See* Exceptions at 36-38 (discussing the plaintiff states' reliance on *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157 (1934)).
22. The definition of interstate commerce in the Natural Gas Act differs from its definition for Commerce Clause purposes. Brief at 37.	22. This contention was flatly rejected by the Court in *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 688 (1947) (citing cases).

Contention of the defendant:	Response of the plaintiff states:
23. "Each prong of the four-part [Commerce Clause] test depends upon factual proof of the relevant economic realities." Brief at 38.	23. A state taxing statute must meet *each* of the four Commerce Clause tests and such determinations have been made in the absence of a record. *See, e.g., Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977) (discrimination against interstate commerce).
24. The plaintiff states have "apparently conceded" that the First Use Tax meets the "substantial nexus" and "fair relation" test. Brief at 39.	24. No such concession has been made. *See* Brief in Support of Motion for Judgment on the Pleadings at 9 & 9 n.9.
25. A factual dispute about one Commerce Clause requirement renders unsuitable a judgment on the pleadings with respect to another of the factors. Brief at 40.	25. The four tests are independent, and all must be satisfied to sustain the constitutionality of the First Use Tax. *See Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734, 750 (1978).
26. The author of a note in the Washington University Law Quarterly has concluded that the First Use Tax does not violate the Commerce Clause. Brief at 40 n.19.	26. The note actually concludes that because the First Use Tax seeks compensation for the extraction of resources from foreign citizens, it violates the Commerce Clause. 58 Wash. U.L.Q. at 357-58; 361-62. The note also finds that the tax interferes with federal authority under the Natural Gas Act. *Id.* at 362 n.102.
27. The defendant's answer states that the First Use Tax is not applied to imports. Brief at 43.	27. By its terms, the First Use Tax is applicable to gas imported from abroad because the United States does not levy an import taxes upon gas from abroad. *See* La. Rev. Stat. Ann. § 47:1303A (West Supp. 1980).

Contention of the defendant:	Response of the plaintiff states:
28. Actuality of operation may show the First Use Tax to be a compensating tax. Brief at 43.	28. Actuality of operation, *i.e.*, the exemptions, credits, and anti-passback features of the First Use Tax scheme, already show that the scheme lacks the equality that must exist for a true compensating tax. *See Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).
29. Louisiana residents who are the ultimate consumers of OCS gas subject to the First Use Tax do pay it. Brief at 43.	29. This assertion ignores the exemption, credit, and anti-pass-back provisions of the scheme, as well as the legislative history which confirms that the scheme was designed to wholly insulate in-state interests from any effect from the First Use Tax.
30. The environmental "burdens suffered by Louisiana . . . are indeed great." Brief at 44.	30. Environmental concerns cannot save a preempted or discriminatory statute. In addition, the transmission of gas from within Louisiana's three-mile limit causes the same problems, yet it is exempt from the First Use Tax.
31. The possibility of interference with the Natural Gas Act is not enough to invalidate the first Use Tax on Supremacy Clause grounds. Brief at 46.	31. The real issue, which the defendant ignores, is whether it has intruded upon an area reserved for federal regulation, and it has. *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84, 90-93 (1963); *Natural Gas Pipeline Co. v. Panoma Corp.*, 349 U.S. 44 (1955).

Contention of the defendant:	Response of the plaintiff states:
32. There must be a showing of the existence of contracts declared to be unenforceable for § 1303C of the First Use Tax to have any effect. Brief at 47-48.	32. No such language appears in § 1303C; the Special Master recognized the existence of such contracts (Report of Special Master at 11-12 & 12 n.11); and the relevant issue is intrusion into an area reserved for federal regulation.
33. The Commission can accommodate itself to the First Use Tax; therefore, no Supremacy Clause violation exists. Brief at 48.	33. The issue of possible accommodation is irrelevant; because the tax impinges on the Commission's authority, it must fall.
34. The Commission may authorize the deletion of reimbursement provisions. Brief at 48.	34. The Commission's orders do not delete any reimbursement provisions or even remotely suggest that the First Use Tax should be passed along to consumers.
35. The defendant included § 1303C in the statute merely to make it clear that the First Use Tax was not a tax on processing. Brief at 49.	35. This eleventh-hour suggestion is utterly at odds with the language of the statutory scheme and its verbatim legislative history.
36. Evidence of legislative deliberation will show that no intent to interfere with the Commission was intended. Brief at 49.	36. The verbatim legislative history demonstrates beyond dispute that the First Use Tax was designed to be passed-on. Evidence of "legislative deliberation" is inadmissible.
37. "No supremacy clause issue is involved until the federal enactment, as administered, purports to prohibit the enforcement of the statute." Brief at 50.	37. The Court has found otherwise. *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84, 90-93 (1963).

Contention of the defendant:	Response of the plaintiff states:
38. "The Natural Gas Policy Act (§ 110) reflects congressional anticipation of state enactment of taxes which might have an impact on the price of natural gas to be paid by the ultimate consumer." Brief at 51.	38. Section 110 of the NGPA permits pass-through of certain severance taxes; however, the First Use Tax is not imposed on the severance of Louisiana's natural gas and, indeed, proclaims it is not a severance tax.
39. "Natural gas" is not in a state suitable for marketing until "processing" is completed. Brief at 52-53.	39. The accuracy of this assertion is irrelevant; in any event, the exemption in the Natural Gas Act is for "production or gathering," not "production or processing," and the former encompasses only the physical aspects of production. *Northern Natural Gas Co. v. State Corporation Commission of Kansas,* 372 U.S. 84, 89-90 (1963); *Phillips Petroleum Co. v. Wisconsin,* 347 U.S. 672, 678-81 (1954).
40. The defendant is prepared to show that certain of the "uses" taxed are not within the comprehensive federal regulatory scheme. Brief at 53.	40. This question admits of no proof. As a matter of law, none of the uses fall outside the Natural Gas Act, as amended.

APPENDIX B

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No. 83, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

BEFORE THE SPECIAL MASTER

REPLY OF THE PLAINTIFF STATES TO THE DEFENDANT'S PROFFER OF PROOF

The State of Maryland, the State of Illinois, the State of Indiana, the Commonwealth of Massachusetts, the State of Michigan, the State of New York, the State of Rhode Island and Providence Plantations, and the State of Wisconsin, by their undersigned attorneys, file this re-

sponse to Louisiana's proffer of proof and state that the proffer demonstrates that the plaintiffs' motion for judgment on the pleadings is ripe for favorable adjudication because there is no dispute as to any material fact, and thus the plaintiff states are entitled to judgment as a matter of law.

INTRODUCTION

At the preliminary conference held on March 21, 1980, the Special Master admonished Louisiana not to file a disingenuous and irrelevant proffer that betrayed a motive to delay the resolution of this case. Transcript of Informal Discussion at 96 (Mar. 21, 1980). Nevertheless, the defendant has disregarded the Special Master's warning and filed a proffer that contains no illustration of relevance or materiality, none of the supporting exhibits Louisiana promised, and for the most part conjures up disputes on issues not pressed by the plaintiffs in their motion for judgment on the pleadings.[1]

For example, of the defendant's 116-page submission, only thirteen pages (¶¶ 86-116 at 90-101; ¶¶ 124-31 at 107-09) purport to concern themselves with issues raised in the plaintiffs' motion, and the statements made on these thirteen pages are either irrelevant or not facts but *legal* argument flowing from faulty *legal* premises. On the other hand, more than sixty pages are expressly devoted to issues not pressed in the plaintiffs' motion (¶¶ 83-85 at 43-90; ¶¶ 119-21 at 103-06; ¶¶132-49 at 109-114) or to jurisdictional questions already decided by the Supreme Court when it granted the plaintiffs' motion for leave to file the complaint (¶¶ 150-54 at 114-16). Louisiana has also included numerous statements in its "basic facts" (¶¶ 4-7 at 5-7;), statutory facts" (¶¶ 73-75 at 35-40), and facts relating to natural gas (¶¶ 8-72 at 7-34), which amount to an attempt to supplement its presentation on issues that have nothing to do with the plaintiffs' motion for judgment

[1] The specific categorization that should be applied to each paragraph of the defendant's proffer appears as an appendix to this reply.

on the pleadings. *See, e.g.*, ¶¶ 63-72 at 29-34 (dealing with alleged environmental and economic conditions).

Louisiana's proffer abounds with legal conclusions and matters irrelevant to the case in its current procedural posture. In addition, many of its "facts" are subject to or have already been subjected to judicial notice, most notably the defendant's description of natural gas processing, *see, e.g., Phillips Petroleum Co. v. Wisconsin,* 347 U.S. 672, 675 (1954), details of government regulation, and the operation of the Louisiana tax.[2] In short, Louisiana's proffer presents no obstacles to an expeditious resolution of this case on the basis of the plaintiffs' motion for judgment on the pleadings. Therefore, the plaintiff states renew their request that the Special Master make a prompt recommendation to the Court that the plaintiffs' motion for judgment on the pleadings be granted.

ARGUMENT

JUDGMENT ON THE PLEADINGS IS APPROPRIATE.

In their motion for judgment on the pleadings, the plaintiff states demonstrate that Louisiana's first use tax contravenes the supremacy clause in two respects: (1) the first use tax amounts to impermissible state regulation which violates the Natural Gas Act, and (2) the tax is preempted by the Outer Continental Shelf Lands Act. The plaintiff states also urge that two commerce clause arguments are dispositive: (1) the first use tax discriminates on its face against interstate commerce, and (2) the tax violates the commerce clause because it is not fairly apportioned to any identifiable activity within the state, and this is apparent from the nature, terms, and operation of the statute. These contentions are purely legal ones. *See Douglas v. Seacoast Products,* 431 U.S. 265, 271-272 (1977) (affirmance of holding on motion for summary judgment

[2] Statistics of the type used in the defendant's proffer (*see, e.g.*, ¶ 10), are available from judicially noticeable published sources. *See, e.g.*, The Gas Supplies of Interstate Natural Gas Pipeline Companies 1976 (U.S. Department of Energy, July 1978).

that state licensure statute is unconstitutional under supremacy clause); *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977) (Court reversed judgment of dismissal entered upon motion and held statute invalid under commerce clause). More importantly, these claims can be decided in this case without any consideration of the many pages Louisiana devotes in its proffer to the supposed remedial purposes of the tax and the alleged adverse effects of OCS gas development.

(1) Supremacy Clause

Supremacy clause analysis, unlike most other areas of constitutional law, does not involve a balancing of competing interests or an inquiry into the nature or strength of the purposes served by the challenged state enactment. If the state law conflicts with or is preempted by federal law, it may not stand. The Supreme Court has already rejected the economic and environmental concerns repeated throughout Louisiana's proffer (most notably in ¶¶ 43-90) as a justification for interference with the regulatory scheme contained in the Federal Natural Gas Act. *See Northern Natural Gas Co. v. State Corporation Commission,* 372 U.S. 84, 93 (1963) ("We have already held that a purpose, however legitimate, to conserve natural resources does not warrant direct interference by the states with the prices of natural gas wholesales in interstate commerce."). *See also FPC v. Corporation Commission of Oklahoma,* 362 F. Supp. 522 (N.D. Okla. 1973), *aff'd,* 415 U.S. 961 (1974).

Nor are the proffered purposes of the Louisiana first use tax any justification for its attempt to contradict the express language and purpose of the Outer Continential Shelf Lands Act, particularly when it is obvious that Congress in that legislation and in the Coastal Zone Management Act has provided for the manner in which that State is to be compensated for its purported economic and environmental claims.[3] In fact, the plaintiffs' preemp-

[3] Even if these contentions were relevant, it is important to note that the flood of economic claims Louisiana alleges in its proffer stems more from that state's deliberate policy of

tion arguments are strengthened by Louisiana's proffer because the defendant's "facts" admit that the purpose of the first use tax is to compensate the state for a lack of OCS royalties and that the tax is aimed at OCS gas (¶¶ 49-51; ¶ 69).

(2) Commerce Clause

The economic and environmental "facts" Louisiana proffers also have no bearing on the commerce clause issues the plaintiffs press in their motion for judgment on the pleadings. The plaintiffs assert that the first use tax is *facially* discriminatory against interstate commerce, thus raising a purely legal challenge that the Court resolves without any inquiry into the legitimacy of the state interests asserted in justification of the discrimination.[4] For example, in *Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978), the Supreme Court said:

> This dispute about ultimate legislative purpose need not be resolved, because its resolution would not be relevant to the constitutional issue to be decided in this case. Contrary to the evident assumption of the state court and the parties, the evil of protectionism can reside in legislative means as well as legislative ends. Thus, it does not matter whether the ultimate aim of ch. 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment.

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undertaxation of its citizens and in-state businesses rather than from OCS activities. W. Vogley, Report of the Economic Working Group Outer Continental Shelf Task Force (May 1972). If Louisiana desires even greater gratuitous compensation, its recourse should be in Congress, not with the enactment of a clearly unconstitutional tax directed at interstate consumers of natural gas.

[4] Despite Louisiana's pretensions to the contrary, all of the OCS gas subject to the first use tax is, as a matter of law and legal precedent, in interstate commerce at the time all of the so-called taxable "uses" occur. *See* discussion *infra* at 7-9.

The purported economic and environmental "facts" Louisiana proffers also have no bearing on the fair apportionment issue the plaintiffs present in their motion. The key commerce clause issues are purely legal ones that emerge from the language and flow from the consequences of the first use tax statute. As noted in *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157, 170 (1954), and *Portline Pipeline Corp. v. Environmental Improvement Commission,* 307 A.2d 1, 33-34 (Me. 1973), *appeal dismissed,* 414 U.S. 1035 (1973), the constitutionally significant aspect of the Louisiana statute is that the tax attaches itself to the volume of natural gas shipped through the state and thus invites retaliatory taxation by other states.[5]

Finally, the commerce clause "fact" that Louisiana seems to stress most in its proffer (¶ 80) is the allegation that natural gas is not in interstate commerce when it moves from the wellhead, but only after the completion of processing.[6] But this "fact" is in truth a purely legal question that the Court has answered many times in a manner contrary to Louisiana's assertion. For example, in *California v. Lo-Vaca Gathering Co.,* 379 U.S. 366, 369

[5] In *Michigan-Wisconsin Pipeline Corp.,* the Supreme Court did not hesitate to disregard the ostensible statutory purposes of a Texas taxing scheme or its "beggared" statutory definition in order to find as a matter of law that the tax violated the commerce clause. In so doing, the Court observed that:

> The appellees place much emphasis upon the fact that Texas through these conservation and proration measures has afforded great benefits and protection to pipeline companies. It is beyond question that the enforcement of these laws has been not only in the public interest but to the commercial advantage of the industry. But, though this be an appealing truth, *these benefits are relevant here only to show that essential requirements of due process have been met sufficiently to justify the imposition of any tax on the interstate activity.*

347 U.S. at 163-64 (emphasis supplied).

[6] It should be noted that Louisiana earlier more frankly and correctly admits (¶ 77) that "[t]he commodity purchased at the well-head by natural gas companies is dedicated to interstate commerce by virtue of its origin in the Outer Continental Shelf . . . ."

(1965), the Court said that "the result of our decision is to make the sale of gas which crosses at any stage of its movement from wellhead to ultimate consumption 'in interstate commerce' within the meaning of the [Natural Gas] Act." Similarly, in *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157, 163 (1954), the Court noted that "[t]he entire movement of the gas, from producing wells through the Phillips gasoline plant and into the Michigan-Wisconsin pipeline to consumers outside Texas, is a steady and continuous flow."[7]

[7] *Michigan-Wisconsin Pipeline Co.* presents a strong analogy to the present case. For example, it foretells Louisiana's attempt (¶¶ 10-18) to distinguish this case by relying on the need to "process" the "raw gas" before "refined" or "dry" gas continues its journey in transcontinental pipelines. Similar activity failed to justify the Texas tax in *Michigan-Wisconsin Pipeline Co.:*

> The question presented is whether the Commerce Clause is infringed by a Texas tax on the occupation of "gathering gas," measured by the entire volume of gas "taken," as applied to an interstate natural gas pipeline company, where the taxable incidence is the taking of gas from the outlet of an independent gasoline plant within the State for the purpose of immediate interstate transmission. In relevant part the tax statute provides that "In addition to all other licenses and taxes levied and assessed in the State of Texas there is hereby levied upon every person engaged in gathering gas produced in this State, an occupation tax for the privilege of engaging in such business, at the rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered." Using a beggared definition of the term "gathering gas," the Act further provides that "In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term 'gathering gas' means the first taking or the first retaining of possession of such gas for other processing or transmission whether through a pipeline, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant." It also prohibits the "gatherer" as therein defined from shifting the burden of the tax to the producer of the gas, and provides that the tax shall not be levied as to gas gathered for local consumption if declared unconstitutional as to that gathered for interstate transmission.

347 U.S. at 161 (footnote omitted).

Nor is Louisiana's detailed recital of the facts of natural gas processing in Louisiana and their importance to the development of natural gas production alter the conclusion that the gas is continuously in interstate commerce,[8] because it is well settled that "processing does not interrupt the continuous movement of the gas from the wellhead to consumer burner tips." *Deep South Oil Co. v. FPC*, 247 F.2d 882, 888 (5th Cir. 1957), *cert. denied*, 355 U.S. 930 (1958).[9] *See also Permian Basin Area Rate Cases*, 390 U.S. 747, 820 n.111 (1968) ("Nonetheless, [the Federal Power Commission (now succeeded by the Federal Energy Regulatory Commission)] asserted jurisdiction, we think properly, over the sale of casinghead gas under the contract.").

In summary, Louisiana's illusory "facts" to the contrary, its proffer of proof with respect to natural gas processing

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[8] The first use tax is levied on OCS gas which, by definition, is "commited or dedicated to interstate commerce." 15 U.S.C.A. § 3301 (18) (A) (West Supp. 1980). The tax does not distinguish between "raw" and "dry" gas; it is collected on "any natural gas." La. Rev. Stat. Ann. § 47:1303A (West Supp. 1980).

[9] In its proffer, Louisiana now admits (¶ 74) that contrary to the language of the first use tax, it cannot tax OCS natural gas on the basis of seven of the enumerated eight uses: "Absent such processing in Louisiana, none of the other enumerated uses would necessarily permit the imposition of the First Use Tax on any taxpayer." This concession is understandable in light of controlling precedent from this Court. Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498, 503-04 (1942) ("point at which title and custody of the gas pass to the purchaser without averting its movement to the intended destination does not affect the essential interstate nature of the business"); Chicago Board of Trade v. Olsen, 262 U.S. 1, 34 (1923) (delivery into storage, even if commingling occurs, "does not take away from the interstate character of the through shipment."); Stafford v. Wallace, 258 U.S. 495, 515 (1922) (measurement of gas is merely an incident to the current of commerce that is both essential to and inseparable from the transportation of the gas); State Corp. Comm'n v. Wichita Gas Co., 290 U.S. 561, 563 (1934) (transportation or delivery by pipeline company of natural gas originating out-of-state is interstate commerce).

does not create a legitimate fact question.[10] As a matter of law, the OCS natural gas being exorbitantly taxed by Louisiana is in interstate commerce.

CONCLUSION

It is apparent that whatever the purposes and justifications of the first use tax, they do not require the Special Master to delay this case with needless evidentiary hearings when the issues the plaintiffs press in their motion *must* be decided without regard to Louisiana's alleged facts.

The Special Master has generously given Louisiana every opportunity to come forward with the kind of facts needed to justify an evidentiary hearing. Instead, the defendant has attempted to cast a smokescreen around the issues pressed by the plaintiff states at this point in the proceedings. Rather than aiding resolution of this case, Louisiana's lengthy and largely irrelevant proffer has shown itself to be a device to delay the ultimate outcome of this case while the defendant, without right, continues to extract from the plaintiff states and their citizens in excess of one-quarter billion dollars annually. Far from justifying an evidentiary hearing, Louisiana's proffer is a compelling reason for the Special Master to act favorably and with dispatch on the plaintiffs' motion for judgment on the pleadings.

Respectfully submitted,

[signatures deleted]

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[10] The plaintiff states should note that they disagree with the accuracy of much of what Louisiana says in its proffer. Thus, while the plaintiffs vigorously urge that no *material* facts are in dispute and that no evidentiary hearing is appropriate, it is clear that the hearing requested by Louisiana, if granted, would be protracted.

APPENDIX

In 154 paragraphs spread across 116 pages, Louisiana has brought forth nothing that suggests the inappropriateness of judgment on the pleadings. Indeed, by conjuring up false issues, harkening back to jurisdictional questions that have already been decided, and in other obvious ways, the defendant has defied the Special Master's warning against "present[ing] a submission which would not be helpful towards building a hearing." Transcript of Informal Discussion at 95 (Mar. 21, 1980). In light of Louisiana's proffer, the plaintiff states urge the Special Master "to go ahead on the motions [for judgment on the pleadings]." *Id.*

As the plaintiff states indicate in the text of their reply, not a single paragraph of the defendant's submission raises a dispute as to any fact material to the issues pressed in their motion. Thus, the paragraphs of Louisiana's proffer may be characterized as follows:

I.

PARAGRAPHS THAT DEAL WITH ISSUES *NOT* PRESSED IN THE MOTION FOR JUDGMENT ON THE PLEADINGS.

Paragraphs	Pages	Subject
4-7	5-7	Substantial nexus and/or relation of tax to services provided tests — commerce clause
11	8	"
13-18	9-11	"
24-28	13-16	"
29-35	16-18	"
41-52	21-24	"
63-72	29-34	"
73-74	35-40	"
83-84	43-61	Substantial nexus test — commerce clause.
85	61-90	Relation of tax to services provided test — commerce clause.
119-21	103-07	Contracts clause claim.
132-45	109-13	Equal protection clause claim.
146-49	113-14	Import-export clause claim.

II.

PARAGRAPHS THAT DEAL WITH JURISDICTIONAL ISSUES ALREADY DECIDED ADVERSELY TO LOUISIANA.

Paragraphs	Pages	Subject
150-54	114-16	Legal issues relating to jurisdiction and standing.

III.

PARAGRAPHS THAT STATE LEGAL CONCLUSIONS, MOSTLY UNFOUNDED, NOT FACTUAL ISSUES.

Paragraphs	Pages	Subject
1-3	4-5	Legal conclusions about the first use tax and interstate commerce.
7	7	Purported legal justification for tax.
36-40	18-20	Statements that may all be derived from pertinent legislation.
53-61	24-28	"
73-74	35-40	Statements of legal questions.
76-154	40-116	Legal conclusions about commerce clause, supremacy clause, equal protection clause, import-export clause, and jurisdictional questions.

IV.

PARAGRAPHS THAT CONTAIN ALLEGATIONS IRRELEVANT TO JUDGMENT ON THE PLEADINGS.

Paragraphs	Pages	Subject
8-18	7-11	OCS production activities.
22-23	13	Contractual arrangements.
25-28	13-16	Natural gas as an energy source.
29-35	16-18	Processing
36-40	18-20	Pricing and marketing.
43-52	21-24	Purported justifications for the tax.
62	29	"
63-72	29-34	Relation of tax to services provided test — commerce clause.

V.

PARAGRAPHS THAT CONTAIN ALLEGATIONS SUBJECT TO JUDICIAL NOTICE.

Paragraphs	Pages	Subject
8-10	7-8	Outer Continental Shelf.
12	9	"
15-17	10-11	Natural gas production.
19-21	11-13	Contractual arrangements.
24-26	13-14	Natural gas as an energy source.
29-30	16-17	Natural gas processing.
36-39	18-20	Pricing and marketing.
75	40	No definitive interpretation of tax by Louisiana Supreme Court.

APPENDIX C

Hearings on H.B. 768

Before the House Committee on Ways and Means

(Hearing of June 5, 1978)

(Mr. Leach) We have Representative Tauzin, Representative Benny Bagert and Representative Raymond Laborde to handle two of the four bills considered in the package of the first use tax.

This is HB 1128, we'll go on for amendments on that Mr. Tauzin. Mr. Coco will give the committee a brief on HB 1128, this is by Representative Bagert.

(Mr. Coco) The proposed law would provide a tax credit against those taxes owed to the state by those electric generating plants and natural gas distributions regulated by a municipality or by the Louisiana Public Service Commission if their fuel costs are increased as a result of the passing of HB 768, the first use tax. It will provide that the secretary of the Department of Natural Resources shall promulgate rules for determining the amount of tax credit granted and for the administration of this Act.

(Mr. Scogin) Mr. Chairman and members of the committee and Mr. Henderson, I think it's passed out for your use during the presentation of this bill, a copy of what the engrossed bill would look like if these amendments that would submit it in conjunction with the bill were adopted in order that the particular bill is underlined the new language which is incorporated into the bill by the amendment. I initially filed this bill after I learned that there was a substantial likelihood that the proposed first use tax would pass for the reason that it would affect my community and to all public service in their cost of gas and which cost is alternately passed on to residential and business users of natural gas and electricity by way of the fuel adjustment according to our rate structure.

(Mr. Leach) Would it please the committee for us to go ahead and that Mr. Bagert would propose to explain the bill as amended to go ahead and get the amendments adopted. I do not think that there would be any objections to these amendments if this is going to be Mr. Bagert's bill. He's all but rewritten the bill with the amendments.

Mr. Champagne did you have a question?

(Mr. Champagne) I have a question but probably you should explain it further, then I'll ask it.

(Mr. Leach) Alright. Is there any objection then for my offering up the amendments which have been passed out to you.

Mr. Sour.

(Mr. Sour) I don't object to the amendments any more than I object to the bill being heard at this time. Couldn't we be possibly wasting time in this committee hearing this bill and the other bill yet unheard and if this one doesn't pass?

(Mr. Leach) Mr. Sour has questioned the scheduling of this bill prior to the bill levying the first use tax. The authors of the bill came to us a couple of weeks ago about scheduling and requested that we hear these two bills on the day prior to hearing the two that are scheduled for tomorrow. One being the actual levy of the tax and I'm really not familiar with that as a dedication and to the trust for state debt. If any House members request we schedule their bills according to what they ask for. If the committee this morning would want to postpone these until the other bills have been heard that would be the pleasure of the committee. We have scheduled bills upon request the House members at the time they have asked for them whenever possible. So, if you would like to move that we defer action Mr. Sour you would be in order to do so.

(Mr. Sour) Well, my thinking is that we just have a good number of bills and really if we hear a bill ahead of them, all predicated on a bill we're going to hear later which has to go through the entire process the Senate and everybody else, we may be just putting off bills that should be hears on their own, not one here dedicated to passage of another one that's yet unborn and yet unheard.

(Mr. Leach) Mr. Sour now moves that we defer hearing HB 1128 as scheduled this morning as announced in the agenda. We will now have discussion of it. I believe Mr. Guidry was first.

Mr. Laborde.

(Mr. Laborde) This bill says in the event that HB 768 is an act of the first use tax?

(Mr. Sour) Yes.

(Mr. Leach) Mr. Guidry.

(Mr. Guidry) Mr. Chairman the biggest issue in the first use tax debate will probably be passed on and not affect the consumers in Louisiana and it would be absolutely pointless to even hear the bill if that were not cleared before we heard it and that's the reason I would assume that we're doing this now in this manner.

(Mr. Leach) Mr. Champagne.

(Mr. Champagne) I would direct this to the author of the other bill. Is there any way why this couldn't be included in the bill?

(Mr. Leach) Mr. Tauzin would you answer the question as to why this is not included with the actual levy of the tax?

(Mr. Tauzin) Yes sir. Whether Louisiana decides to grant credit to the people in Louisiana who have impact on the first use tax is a separate issue. Mr. Guidry is absolutely correct, however, before you hear the tax. I think it would be wise for you to make the decision that you want to or don't want to give credit to the Louisiana users. The bills are separate by different authors and frankly I think for the purposes of the constitutionality of the tax proposal itself we ought not have any relationship in the same bill.

(Mr. Leach) Would you just tell Mr. Champagne why this is not incorporated in the tax bill itself. That's the only answer we need right now.

(Mr. Tauzin) I think I explained that. It's a question of constitutionality.

(Mr. Leach) A question of constitutionality.

Mr. Scogin.

(Mr. Scogin) What I'd like to know Mr. Tauzin is that if indeed we do pass the other bill and indeed do pass this one if some determination has been made to relate the physical impact to the other bill. If it is with no doubt would be a reduction, would it not?

(Mr. Tauzin) Yes sir. We estimate that somewhere between one hundred seventy and, two hundred million degenerate despite the credit.

(Mr. Scogin) In other words they digure that since floating around, is after something like this has occurred.

(Mr. Tauzin) Yes sir.

(Mr. Scogin) Let me ask you to phrase it the other way then. If we didn't pass these credits were not granted what would be the figure?

(Mr. Tauzin) It would be closer to about two hundred ten or two hundred twenty million.

(Mr. Scogin) Will, the reduction amount to some thirty million?

(Mr. Tauzin) It all depends. There are a lot of factors in here as to how the credit work. It would be somewhere between ten and twenty-five million.

(Mr. Leach) Did you have another question?

(Mr. Champagne) Yes, I have another one on constitutionality. Don't you think there's also that probability that say the other tax passed declared constitutional but this one declared unconstitutional?

(Mr. Tauzin) This bill is . . . with the help of the people who work with us on the first use tax only has an affect if indeed you have a first use tax and no credits at all until they have a first use tax.

(Mr. Champagne) I understand all that but it's not clear in my mind about the constitutionality of it. If it's the constitution in one case where we can make a side issue and maybe sneak the other one through but then this one would say well now, if there's a problem your problem is with the two together you might have a constitutionality problem.

(Mr. Tauzin) If you put the two together you've given the people who want to defeat it a chance to go to court and say look they've passed the act to just cover people outside Louisiana.

(Mr. Sour) Is it common practice to say that next year we might vote a sales tax, let's start hearing some bills this year on exclusions. Who all are we going to exclude from the sales tax next year when it pass or next week or next month? I just think that the committee could be put into a position to look rather foolish. Of course maybe some of you all are all for concluding that if you vote on conclusion first use is going to pass. I hate to think that the press has already set the type on that before we ever hear it on this committee.

(Mr. Leach) Mr. John John.

(Mr. John John) I'm not being a lawyer but passing this bill predicating on the other bill and we know that the other bill will be tested in court. Could this be a factor that the intent was directly to exclude Louisiana. (not clear)

(Mr. Tauzin) The only concern is in what order they come in. The attorneys who helped us on it are not concerned about the order they are concerned about the order and I think Mr. Bagert's concerned about the order only because it will bring you the first use tax after you've been satisfied that the credit bills have been heard by you and you want to give those credits to people in Louisiana that you're given. I think it's only fair to this committee and the legislature for them to know that you'd take care of that problem if you want to prior to looking at the first use tax.

(Mr. ?) We don't want to levy the first use tax and have it affect people in businesses in Louisiana.

(Mr. ?) As far as I'm concerned I don't want the first use tax if it's going to do that and that's why I initially authored this bill and then got together and worked it out with Billy.

(Mr. ?) I can understand that very well sir and believe me I only vote for it myself with intention but I do think you should try the legality of it and put another stumbling block in front of the possible passage of this bill.

(Mr. Leach) Is there any other committee member who has a question they would like to have answered? Mr. Sour.

(Mr. Sour) My question is Mr. Bagert and Mr. Tauzin, don't you think that Mr. John got right to the heart of the thing. Don't you think that it could possibly place the constitutionality of the first use tax if it's passed in jeopardy by saying that you proved conclusively ahead of time that you are excluding the people of Louisiana from this tax and you're going to definitely pass it on to out of state people?

(Mr. Bagert) I don't think the tax is so important that we have to have it even if it affects people in businesses in Louisiana. I think the most important thing is that if we do pass the tax, that we don't affect people in Louisiana and if they throw us all in the same hat, they'd say you did it this way and it was a scheme — fine. It wasn't a scheme when it started. All I intended when it started was to make sure that the elected . . . in my community weren't affected by it because their rates are high enough because of high fuel costs and I didn't want their fuel costs to get any higher. Actually there is no scheme. I don't think that the tax is something that is so important that we have to pass it without the assurance that certain people and businesses in Louisiana wouldn't be affected.

(Mr. Bagert) To further answer your question my bill is No. 1128 and we all are going to get filed chronologically. Billy is checking the number of his, but I know it isn't filed before mine.

(Mr. Leach) Mr. Guidry.

(Mr. Guidry) Gentlemen, I want to make it perfectly clear how I stand on this thing and that is simply that there is indeed a purpose in my voting on this first use tax in that I don't want it to affect the people of Louisiana and that we want to pass it on and that is not in fact our purpose that I'm against the whole thing and I think every one of us here is that way and how this committee hears this bill in what order I think has nothing to do with this. How the governor signs the bills may have some bearing on it, although I doubt it so I move that we just go along and hear the bill.

(Mr. Leach) Now we have a motion on the floor Mr. Guidry.

(Mr. Leach) The motion now is the Sour motion to defer hearing HB 1128 by Representative Bagert. Those in favor of deferring the hearing as moved by Mr. Sour vote yes, those opposed to deferring hearing will vote no and the secretary will call the roll.

(Mr. Leach) The vote is three in favor and eleven opposed. We will continue then with the hearing of HB 1228 for one set of amendments have been adopted at this time I offer for such amendments adding Representative Bel as coauthor and Representative Jackson. Is there any objection to that? The coauthored amendment is adopted.

(Mr. Leach) Mr. Champagne.

(Mr. Champagne) I have a question. I have some problem with setting up regulated by a municipality or by the Louisiana Public Service Commission. I'm sure you're aware that there is a bill to take a certain co-ops or something out from the controls of the Louisiana Public

Service Commission if that bill went into effect since we're talking about future bills. Would this eliminate them?

(Mr. Guidry) No. The additional language I think makes it perfectly clear that those co-ops would still enjoy the benefit of the credit that extends the credit to any other affected consumers. I think that would cover the contingency that you just raised.

(Mr. Champagne) You don't think there's another way we could skim this Chapter without doing it like that exactly?

(Mr. Guidry) No.

(Mr. Laborde) Mr. Bagert I have not completely digested the amendments and my question is — in my area for instance, and I'm sure there are other areas in the state and the town of Vinton buy the electric current from Gulf States Utilities Co. and that current is generated in the state of Texas. Wouldn't it in effect, Gulf States have some kind of loop hole to charge more money to the town of Vinton and would not be protected by the provisions of this bill?

(Mr. Bagert) If they generate in Texas then they will not have any increased cost as a result of Louisiana's first use tax.

(Mr. Laborde) Yes they will. We put that first use tax — everybody using gas outside of the state of Louisiana will have to pay the first use tax and I don't know but there may have been occasions where power is generated in Arkansas, Mississippi or maybe way up north and in case of an emergency some of that will have to be channeled down here. All these lines are interlocked throughout the country and I'm concerned about any electric power that's generated outside the state of Louisiana and pushed back to us they won't have to pay the first use tax our people would be subjected to it.

(Mr. Tauzin) The first use tax only covers activities associated with gas produced off Louisiana's coast is brought into Louisiana first and there is some activity with it in Louisiana. That gas is . . . by a pipeline company to a . . . gas. Maybe the pipeline companies own the gas by the time they produce it offshore in Louisiana. In about 15% of the cases the producers still own the gas and they own it until they actually process it and sell the dry gas off. But in the majority of the cases the pipeline company already owns the gas, brings it into Louisiana, processes it at the plants in Louisiana and then ships it into commerce. As I said, when they process it they extract liquids from it, about 5% liquids and about 95% is dry gas that's used by consumers. Of the dry gas that's used by consumers only 1½% of some of that stays in Louisiana. 98½% of it goes out of state and primarily the states of the northeast and the midwest. The concern that they have is about the Texas facility transporting electricity back to Louisiana is one that you needn't worry about. What we're talking about then is the mere 1½% of it stays in Louisiana. That is the subject of Mr. Bagert's bill. 1½% that's consumed in Louisiana either by a municipal generating plant or by a separate generating facility or by industry that we're using some of that gas. That's all we're talking about here and the credit should go under Mr. Bagert's bill as amended. These consumers will feel a direct impact of the first use tax upon their rates or upon their cost of gas. That's only a small amount Mr. Laborde and as I say it wouldn't affect . . .

(Mr. Laborde) I just used this case in particular because I'm familiar with it but I'm just wondering if maybe some other towns or cities along the borders of this state do not buy electric power from plants that are generated in other states and possibly some of this offshore gas could be going to them. We have a new facility being built in Lake Charles import liquified natural gas and all that gas coming into Lake Charles ought to be going to poor

midwestern states. This has nothing to do with the bill but I'm just using it as an illustration to show that these pipelines are connected all over the United States and might use the gas for a generating power in Wisconsin and at some time or another it will be channeled back to Louisiana. I think that's possible.

(Mr. Tauzin) The answer Mr. Laborde is that the bill provides a credit to the electric generating facility in Louisiana who feels an impact. If that should occur and I'm suggesting that . . . the electric generating facility regulating in Louisiana has a right to apply for the tax credit of any directing tax of (not clear) . . .

(Mr. Leach) Mr. Bruneau.

(Mr. Bruneau) Benny I have the same concern that you do. I'm not so much concerned though that whether the first use tax passes but I am concerned that if it does pass what the effect will be on the citizens of the state of Louisiana and on our locally owned industries. I'm looking at the severability clause of your bill and I frankly don't understand why there's a severability clause with respect to just one section of the law. How can you hold a part of this bill, bill No. 1128 unconstitutional?

(Mr. Bagert) Are you saying that the severability clause doesn't take into account the passage of—

(Mr. Bruneau) No it doesn't, I'm going to get to that. You're adding one section to the law and I don't see the effect of the severability clause when you're just adding one section to the law. Now this is my next question. Because I think if any part of this Section is held unconstitutional I think the whole section is going to be held unconstitutional. My fear with respect to all of this is that this is the one that's going to be held unconstitutional because it's a discriminatory thing on local people. This is the one that's going to be held unconstitutional and then we're going to be stuck with the first use tax on your own people. That's what really bothers me about the whole

thing. And my suggestion to that is to put that if this bill is ever made constitutional then the first use tax is repealed.

(Mr. Tauzin) Mr. Bruneau, the state of Louisiana has granted similar tax credits for a long long time to use it in. . . The most typical example is the gas severance tax . . . prior to even that time there were gas credits allowed to people in Louisiana. It's been a common practice and . . .

(Mr. Bruneau) Billy I'm aware of that. Was the constitutionality of any of those things ever contested?

(Mr. Tauzin) I don't believe. The reason is people who receive credits don't contest it.

(Mr. Bruneau) How about the people who don't receive credit?

(Mr. Tauzin) If those people go to court they are going to court because they want to attack the tax that taxes them without a credit. If I'm a taxpayer and I don't like the fact that somebody is getting credit I use that fact to attack the tax. It's never been done. All I can tell you Mr. Bruneau is that I think you're assuming that worrying about something that just not in our experience.

(Mr. Bruneau) That's the point I made to you. You tell me it's constitutional but nobody doesn't challenge it and I tell you that doesn't prove constitutionality one way or the other.

(Mr. Tauzin) What I'm suggesting Mr. Bruneau is that the taxpayer who is concerned about the fact that we granted somebody could get a credit . . . he's going to attack the fact that he's paying tax without a credit. If he wins that fact then the whole thing's over. If he loses that fight he's lost it that's it.

(Mr. Bruneau) No, he just go into court on all three of them. He's going to say it's discriminatory and that's a non-tax to the local people and I think the court then has

an option to throw out the local exemption and say the tax is good it's applied across the board.

(Mr. Bagert) This is what I understand that the first use tax is the tax on an activity and it does tax those people located here (people and businesses) who engage in that activity without any exemption. It taxes those people who . . . and process natural gas and then pass it on. It's not a question of discriminating, it taxes everybody who does and doesn't anybody who doesn't. Now just because we have another bill that provides a credit to the people who are affected by that tax and I don't think there's any great power. I don't think you're talking about Section 4 which is the severability clause which says "if one portion of this Act" you're talking the repealer clause.

(Mr. Bruneau) I'm talking about Section 5 that says "all laws or parts of laws in conflict herewith are hereby repealed."

(Mr. Bagert) The repeal of what laws are you worried about?

(Mr. Bruneau) Well actually I'm worried about the severability. This is what I'm worried about. Somebody goes to court, and they bring this up and they say Bill No. 1128 Act No. such and such by Mr. Bagert, bill No. such and such and Act No. such and such by Mr. Laborde and they say you've got to consider the totality of all these things together, okay, and the deter fact when you consider all of them together is the complete pass on them, correct?

(Mr. Bagert) If that argument is accepted, yes.

(Mr. Bruneau) Bill is right. The plaintiffs in the suit are going to be arguing for the unconstitutionality of the first use tax, however, suppose they make an argument about a discriminatory in everything else and somebody on the court says well in order to make it not discriminatory we just don't need local exemptions and they strike out the local exemptions as being the discriminatory part of the

tax. Gaining of the tax and no local exemption and that's my fear about it.

(Mr. Bagert) Then it shouldn't be the repealer clause in this bill Peppi that would scare you. It would seem to me that we would be afraid of the repealer clause in the tax bill.

(Mr. Tauzin) All I can tell you is that I think your fear is totally absolutely . . . The state of Louisiana had the right to grant a tax credit to any one of its citizens. We impose the taxes that we talked about during a credit review. We have a right to induce them to our own citizens if we want to and those citizens fall into a special category of citizens. We can't selectively give a tax credit to . . . No question about the state's right to grant a tax credit if he want to do it. What's going to happen in that court Peppi is that the court is even going to rule that these things are all part of one seam and that we can do it or we can't.

(Mr. Bruneau) I understand that Mr. Tauzin but you and I have been practicing law long enough to know that we don't know what a court is going to do.

(Mr. Bruneau) My question is this to Mr. Bagert and to Mr. Tauzin, will you all object to the . . . in the appropriate place and I'll let you all desire where the appropriate place is if you have no objections, it says that if the credit falls the tax falls?

(Mr. Bagert) I think you're looking at the wrong repealer clause and get . . . the repealer clause in this bill rather than the repealer clause in Tauzin's bill. That's the bill that you should remove the repealer clause from because if you remove the repealer clause from this bill just the opposite will happen. You and I have the same exact philosophy about this first use tax. That's not my tax and I'm not going to lose an ounce of sleep over it. The thing that I'm worried about is having the first use tax passed and not having this passed and I would suggest if you really think it out the place where you should remove the repealer clause would be in Tauzin's bill but not in

mine because if Tauzin's bill fails and mine passes then you have nothing.

(Mr. Leach) Mr. Scogin we need the bill explained now as you now have it.

(Mr. Scogin) Every electric generating plant, natural gas distributions, service municipally owned or regulated by the Public Service Commission . . . which is continued in amendment No. 5 says in every direct purchase of natural gas from the owner of the natural gas other than an owner of natural gas regulated by the municipality and state assumption shall be allowed to grant credit. Credit will work in identically the same fashion as the natural gas tax credit. Warrants will be issued by the Dept. of Revenue to those individuals who have cut additional costs as a result of any first use tax which may be levied. Those warrants can then be used to pay state taxes or to pay local taxes, municipal or parochial taxes or taxes of that nature. And of course ultimately those warrants when you give it to the municipality or we submit it to the state treasurer . . . I guess essentially that's all the bill does.

(Mr. Leach) Do you have a fiscal note as to what this exemption would cost if it is enacted and if the tax is enacted?

(Mr. Scogin) No sir.

(Mr. Tauzin) Roughly, a million dollars annually would amount to give credit to direct consumers . . .

(Mr. Leach) The tax credits would be issued to affected industry to qualify for this particular credit would be one they could use against any state taxes and you've stated also municipal or local. Would the state reimburse that municipality or that locality for that credit?

(Mr. Bagert) It would issue a warrant to the taxpayer and the taxpayer would then give the warrant to the tax recipient body and they pass the warrant.

(Mr. Leach) So it will be nothing from local government?

(Mr. Bagert) Correct.

(Mr. Leach) Mr. Bel.

(Mr. Bel) I'd like to make a motion. I move that we vote the bill favorably as amended.

(Mr. Leach) Mr. Bel now moves that the bill be reported favorably as amended. Is there any committee member who has a statement or a question they'd like to ask? Is there objection to the Bel motion? Is there any objection to reporting the bill favorably as amended? No objection. Then the bill will be reported favorably as amended. I'd like to state very quickly that the committee intends to hear all bills that were scheduled on the agenda today. The reason for not beginning at the top of the list was the fact that the authors of those bills were not in the committee room. They accepted no plan not to hear any bill and any information contrary is erroneous to since we've been waiting for the authors of the bills to be in the room when we called them.

(Mr. Leach) The committee clerk has passed out amendments to HB 1187. Mr. Coco would you go ahead and give the committee the brief on that.

(Mr. Coco) HB 1187 by Representative Raymond Laborde would provide a credit against severance taxes paid to the state or any taxes paid as a consequence of the first use tax. Further would provide that parish severance tax collections will not be affected.

(Mr. Leach) Mr. Laborde would you like for us to adopt the amendments and discuss . . . affect the bill? Mr. Ackal moves that the amendments as presented be adopted. If you'd like a discussion of them before the bill we will go through them. There are two sets of amendments, we'll ask Mr. Laborde to give us a general . . . of the bill and then we'll present each amendment separately and have it act upon. Mr. Laborde

(Mr. Laborde) Mr. chairman and members of the committee this bill attempts to correct the problem that Billy mentioned a moment ago about the 15% of producers

that own gas and will not be able to pass it on to the pipeline. I think it's a general concensus and I know it is mine. If the first use tax is passed it's going to be a passed on tax, no question about it. But I'm concerned here about the 50% which Billy showed you a moment ago that they will not be able to pass it all on and that's what this bill is going to attempt to correct to make sure if they're not able to then they will be reimbursed (not clear)

(Mr. Leach) Mr. Ackal

(Mr. Ackal) Mr. chairman I think we ought to go ahead and adopt the amendments because . . .

(Mr. Leach) Mr. Ackal has now moved that amendments 1, 2, 3 of the first set amendment No. 1, 2 of the second set be adopted. You have copies of these amendments so this is now open for discussion.

(Mr. Leach) Mr. Champagne moves a favorable adoption of amendment No. 1 is there objection? No objection, No. 1 is adopted. Is there any objection to the two sets of amendments being adopted at this time? Mr. Champagne now moves that the remainder of the first set and all of the second set of amendments now be favorably adopted. Is there any objection? No objection, then they stand adopted. The bill will be discussed by Mr. Laborde and Mr. Tauzin as amended. At the conclusion of the bill the committee will then instruct . . . whether or not additional work is needed by staff before the bill is reported.

(Mr. Tauzin) Mr. chairman one of the principle concerns is that we have when we look into the Laborde bill in discussing with the members of the industry was their concern that they wanted a tax credit pending a determination if they had a right to pass it. Many of them produced a contract — and that's 15% of the . . . 15% of the cases where producers still own the gas. The one that produces it inside Louisiana then he sells the dry gas. In that 15% of the cases many of the contracts provide that they can pass through to the pipeline company as much as 75% or more, in some cases 100% of any increased costs

that they have in processing it. In those cases the bill provides that if they have a right to pass it into the pipeline company they wouldn't get a credit. There concern is what happens until we get the right . . . we have a right to pass it or not. The bill provides this mechanism. When the producer pays the tax he immediately applies for the credit and he submits to the revenue department all documents that would indicate whether or not he has a right to pass his tax on to the pipeline company. If revenue determines that he can he so destructive that he can't. He is then given 30 days to appeal revenue's decision to the Board of Tax Appeals and that board acts that if it decides that it can pass it on he is not engaged to seek administrative or judicial authority to do that. If he does so, all during this period he gets a tax credit. If he goes to court all during the . . . he gets a tax credit. So then when he's finally determined that he's not entitled to the tax credit then he had a right to pass it on then he must reimburse all the taxes that is probably an amount passed on in the actual collection itself. The only interest he owes on it is the interest he collects. If he wins this case he'll go out and pass it on to the pipeline company. This bill provides by amendment that if the producer ends up being the bearer of the tax as a result of the failure of the provisions of the first use tax then he gets a credit too. If the first use tax doesn't work as we hope and expect it will if the producer ends up getting . . . because the pipeline company passes it back to him then he gets a credit for the taxes being used so he doesn't lose any money. This mechanism is self destruct and as I told you simply to satisfy the producers concern that the first use tax might not work. It doesn't work the way you want it to work. So we end up just taxing our producers and . . . That's the bill as amended. The only way the producers can get a credit in this case is to waive any rights or refunds from the first use so it doesn't get paid twice in the first use . . .

(Mr. ?) Is there any objection to the bill? Will the secretary call the roll

(Mr. Tauzin) In 1973 when we doubled the severance tax on natural gas we granted Louisiana citizens more of tax credits then the impact of that increasing severance tax was. We repealed the state property tax and reduced the state income tax, we reduced the state sales tax. When you add up the total of those taxes and credits given to Louisiana citizens those totals exceeded the amount of impact of the severance tax increases that we've had. We not only had a complete pass on we have extra pass on.

(Mr. ?) I meant though, like a tax credit to industry as an inducement. Every industry in the state didn't get that did they?

(Mr. Tauzin) The industries who got it were those that used natural gas that were subject to the severance tax. Same thing we're doing here.

(Mr. Leach) Mr. Bagert would you attempt to cover your bill and we will not interrupt for questions and then we'll have questions. Before you do that Mr. Bagert Mr. Scogin has a question.

(Mr. Scogin) Whether you realize it or not you're placing in the Dept. of Revenue and Taxation an added burden that it relates to determining the amount of the cost increase. Should it be limited to the amount increased in sales cost? Is it going to be difficult to determine one way or another or just how they are going to do that?

(Mr. Bagert) I don't think so Mr. Scogin. Before doing this I met with a fellow named Mr. Campbell at the revenue department. The method that would be used here would be identical to the natural gas tax credit and he advised me that there would be no problem with doing it that way. But, be that as it may, put an increased burden on the revenue department is occasioned by the passage of this bill. I'm sure that any additional cost would . . .

(Mr. Scogin) . . . the legislature would play no part in determining the amount of credit. Apparently the part of revenue taxation is going to be the one that determines it

not the legislature. I would be concerned as to whether or not it might be used as a catchall.

(Mr. Bagert) I think the amount of credit is whatever the amount of tax is.

(Mr. Scogin) Well, as Billy mentioned earlier there will be some in Louisiana where they will be affected of those producing within the state and it's going to be of some gray area.

(Mr. Leach) Mr. Bagert would you now explain your bill as amended.

(Mr. Bagert) Mr. chairman, I think by answering all the questions I tried to write and fully explained it, the only difference between this bill and the way I initially have it (cut off)

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

I, Jerry J. Guillot, Director of Committee Staff Services and Custodian of Committee Records, do hereby certify that on this day, September 8, 1980, that the foregoing is a true and correct copy of the transcription of a tape recording made at the June 5, 1978 Meeting of the House Committee on Ways and Means concerning House Bill No. 768 of the 1978 Regular Session of the Louisiana Legislature, and that the tape used for transcription was a tape used to record said meeting and that said tape has been in the constant possession of my office with the staff of the House Committee on Ways and Means.

/s/ JERRY J. GUILLOT
Jerry J. Guillot, Director
Committee Staff Services
Louisiana Legislative Council

Hearings on H.B. 768
Before the House Committee on Ways and Means
(Hearing of June 6, 1978)

Number 3 — is there a mechanism for a declaratory judgment?

Yes, sir.

All right, is that soley the option of the Revenue Dept. or would that be at the option of the taxpayer?

Actually, the way we provided in the bill the state of Louisiana is an indispensable party to the suits in reference so that even the state or any one of the parties should . . . since we have prosecutional issues at stake here. Under the present laws of the state of Louisiana, we are directed to . . . the state Supreme Court for declaratory relief on the issue.

So you, an individual could . . . . .

(Mr. Leach) Mr. Dawson, would you come up to the table and for remainder of the first use tax we would appreciate you representing the Revenue Dept. here today.

What I was questioning Billy about was the procedures that the Revenue Dept. could undergo to collect this tax. My appreciation to the tax would not pay to go in through a distraint proceeding to collect it. Right?

(Mr. Dawson) Well, there are several procedures we could use to collect the tax. One of them would be to go through our regular assessment procedure. Another method would be to file suit to enforce it.

(Mr. ?) All right, now that would be a declaratory judgment procedure.

(Mr. Dawson) No, not necessarily. We have a normal suit process like you file a suit, to collect the taxes.

Well, would the taxpayer have the option to file a declaratory judgment?

(Mr. Dawson) The taxpayer would also if we do an audit on someone and come up with an amount that we say is

due in deficiency or if the taxpayer himself, through his bookkeeping procedures, were to come up and say that the state claimed we owe this amount of money, we don't think we do, they could pay it under protest and file suit against us.

They would have to pay the tax under protest?

(Mr. Dawson) Well, that would be one that they could file a declaratory judgment suit as you—

Can the taxpayer file a declaratory judgment suit on this particular bill as written?

(Mr. Dawson) I think they probably could, questioning the constitutionality which I understand is the big question here. They could file a declaratory judgment asking the court to determine the constitutionality.

In the event that a taxpayer did that, will you then not have to pay the tax pending the suit or could the Revenue Dept. go ahead and proceed by other avenues and force him to pay the taxes?

(Mr. Dawson) If a suit is filed our policy is that we go ahead and litigate the suit and make a determination of whether our taxes are due or not.

(Mr. Leach) Any other questions Mr. Bruneau?

(Mr. Bruneau) No, sir.

(Mr. Leach) All right. Mr. Tauzin, I'd like to ask this question. Perhaps it should have been asked another day — your bill yesterday but we're down to the actual . . . of the tax now.

(Mr. Tauzin) Yes, sir.

(Mr. Leach) You mentioned the FDRC hearing on the application by the transmission companies to FDRC and you are allowing ample time in the bill for the application to be processed and receive a ruling.

(Mr. Tauzin) Yes, sir.

(Mr. Leach) If they are allowed to increase their rates to pass through the tax that is the intent of your bill?

(Mr. Tauzin) It's more than that.

(Mr. Leach) All right, if they're allowed to do it and everything's proceeding orderly. Now when they're told they cannot increase their — if they should be told they cannot increase their rates and therefore they would have to absorb this — I have been informed that the transmission companies, pipeline companies, have certain contracts from the owners they purchased this gas from that says they're not to be paying any costs — any additional costs of this. Now where does the transmission companies go — who they look to — for reimbursement.

(Mr. Tauzin) First of all, you need to understand the procedure before the . . . . Procedure would not simply involve this tax. It would involve everything that is involved in a rate base of the—

(Mr. Leach) Yes, I'm familiar with the rate base. We're just trying to cut through it and say bottom line they were not allowed to do it.

(Mr. Tauzin) Well, that's just the thing but let's start with something. The federal government has allowed the pipeline company generally a 10% profit. If they operate efficiently they can come up with a 10% profit. If they operate inefficiently, do a bad job of performing, they're not going to make any money. But, assuming their operations are efficient, generally they're allowed a 10% profit. They're the only players in the game of energy production who have . . . if they operate efficiently. Producers you see in this room operate as efficiently as they want — make more money. Pipelines can't — under present federal regulations. The reason for that, of course, is the federal government is very, very interested in maintaining those pipeline companies because they supply the . . . So, first of all you've got to understand that pipeline companies have always and are always doing and

still doing it today . . . and the federal authorities have allowed them to pick up whatever necessary in costs, their costs, to compensate them along and make a 10% profit. You can understand now. You can understand that the federal government—

(Mr. Leach) Yes, I understand this, Billy. My question in the interest of time now, cause we still have . . . to hear from — I'm trying to understand what would happen if the pipeline application to continue making their 10% is disallowed for the additional cost of the levying of this tax by Louisiana.

(Mr. Tauzin) What I'm trying to point out is it's a terribly unlikely event.

(Mr. Leach) Well, all right, let's — we're going to use the event that it's not allowed. That's what I want to get to.

(Mr. Tauzin) It's a terribly unlikely event it's allowed . . . is to try to enforce those provisions of the contract to pass it back on the producer through the assumption of costs provisions which we have modified in our bill. We provide the state as appointive interest in that particular proceeding to protect the producer from having to absorb the costs. If we lose that provisions — if the pipeline companies succeed in passing it back on the producer, then the LaBorde bill, which was passed yesterday, provides that the producer will end up bearing the tax . . . gets the tax credit from the state in whatever it can bear so we have a revolving door matter then. When he comes in a pipeline company and he goes right out into the producer who compensates the pipeline company. To have a revolving door . . . the bill selfdestructs. It doesn't do us any good at that point. We, of course, would need to repeal it.

(Mr. Leach) Will it — when we start this revolving door — if a producer doesn't have tax liabilities equal to his tax credits then the producer is still the one who is being damaged at that point or is—

(Mr. Tauzin) Yes, sir. With a great majority of cases that's not so. But, it could happen, you understand that?

(Mr. Leach) What I'm more concerned about is if said producer decides that he doesn't want to participate in the first use that we're using here, if he decides that he'll just sell his gas out of . . . and not extract, not reserve any rights to any of the liquifiables and send that gas on through, which I understand, would result in a higher BTU output, etc. when it reaches the other end, what happens to the industries in Louisiana that's been dependent upon these hydrocarbons and these liquifiables, our source?

(Mr. Tauzin) Well, of course — that is occurring today. Where it becomes that economical . . . you're just not going to do it. There's some gas produced, for example, in an off-shore area in western Louisiana that is so dry when you produce that it's not really economical process — that is . . . so where it's not economical, you're right, that would occur.

(Mr. Leach) Well, is this going to accelerate the . . . ?

(Mr. Tauzin) I suggest to you that we're . . . is that we end up with this revolving door in a great majority of the cases and when that happens we have no more bill. Then the producers compensated as a credit from the first use tax which is paid by the pipeline company which gets credit from the producer under his contract. It will end all . . . What I'm suggesting to you, Buddy, is that in the past year, we put together a bill that provides us with an excellent opportunity of making this thing work and I suggest to you that where you cannot work in the LaBorde bill you're provided a . . . mechanism that would take care of a vast majority of the cases — cannot cover them all — simply because not all of them are adequate taxpayers in this state to the extent that they don't pay enough taxes in this state . . . I'll grant you that. But what I'm telling you is the bill will be so devastated at that point that it's useless for us.

(Mr. Leach) I appreciate the amount of work, time and energies that you and others have put on this and basically it's a governor outline and the policy of present-

ing this session I'm much in accord with, but, I think, for the benefit of the hearing, the purpose of the hearing, are to get to these issues that we must look at. And I'm concerned about these industries that are developed in Louisiana and their supply of these liquifiables, I'm told, are processed out by the producers — they reserve the right to these. And they're processed here in Louisiana and are available for supplies to our other industries developed around Louisiana.

(Mr. Tauzin) Well, let me suggest to you, Buddy, that I've done a very unpolitical thing in the last couple of weeks. I've met with the producers and the pipeline companies for the last several weeks and I've . . . . As late as yesterday we met two hours with the governor. We've given every possible concession we can make to them in this area.

(Mr. Leach) I understand that.

(Mr. Tauzin) Let me finish. And still have a workable bill. If we concede anymore we give up the bill. We're at that point.

(Mr. Leach) All right.

(Mr. Tauzin) Let me finish.

(Mr. Leach) Well, no, that's — we need to move on Billy cause we have — I understand that you've done this but my point is while this is all well and good there are some issues that the committee, before they take their vote, should be aware of and that's the things I want to become more knowledgeable on. And whereas you've made concessions there's still some things that I think legitimately should be brought out to the hearing. Now I'm concerned because I work in a rural constituency. I'm very concerned about what's going to cause — happen to the price of the butane and other gases that are used by the constituents in rural Louisiana should the shortage of these uh—

(Mr. Tauzin) Let me use some facts.

(Mr. Leach) All right, good.

(Mr. Tauzin) Two-thirds of all the butane is derived from refinery process. Only one-third comes from gas liquid to begin with. Butane makes up 1% of the gas liquid extracted. Only 4 to 5% of the butane goes into LBG used in part by the rural agricultural community in Louisiana while 10% of the butane gas goes to the federal chemical industry which turns it into . . . a critical component of the synthetic rubber and plastic sold nationwide — 85 to 87% of the butane recovered is used in the manufacture of gasoline which is also sold nationwide. What I'm telling you is when you continue breaking down these percentages an extremely small percentage impacts on Louisiana . . . What I've told you earlier is that an extremely small percent of the cases are not covered under the LaBorde destruct mechanism. And when you add those two percentages together or figure them against one another your concern is very minimal — extremely small — certainly not large enough to make you want to vote against the bill.

(Mr. Leach) No one has talked about my voting for or against the bill, but as chairman of the committee I think these problems should be discussed and concessions and this and that does not remove the fact that we are looking at some very serious things.

Now, let's go back to the point where the FDRC has not allowed the very small possibility, the remote possibility that you're not allowed an increase to be passed through. The . . . goes back to the producer. Tries to go back to the producer. Now, where in your bill . . . what in the bill now will try to prevent the producer from having to pay these costs?

(Mr. Tauzin) Two things. First of all there's a legal question and the producers will tell you . . . question as to whether or not costs of production includes the tax. Some of them believe it might but I guarantee you this — and they've admitted this in private — is the fact that when companies demand it from them they could argue that the costs of production does not include the tax. So that, first

of all, is an issue that has to be decided. Secondly, we provided in the bill, Sec. C on page 4 of the bill we're looking at, the original bill doesn't have any, we provided in Sec. C, which provides a public policy against such contractual provisions that it is in the public interest of the party who owns the resource — owns 95% of the gas on which the tax is measured . . . and not pass it back upon people in this state who only own 5% when the taxes don't even measure against that 5%. Dr. Dakin is here . . .

(Mr. Leach) Do you think this, in essence then, public policy here is to abrogate the contract of the sale between the producer and the pipeline company initially?

(Mr. Tauzin) I have discussed that point with Mr. Sour earlier. Perhaps you were not in the room, Mr. Leach. There's a difference between abrogation and modification. Abrogation goes to the part of the contract which is the principal reason why the contract is effective. In this case it's for the sale of natural gas to the pipeline company. Modification goes to the amendment or the changing or the actual overriding of provisions of the contract that are peripheral to the main issue and that are against stated public policy of interest to the people of the state. We're saying in this case that we have . . . the cost of production whether it includes taxes collected by the state. That peripheral issue is in the contract or said to be against the public policy of Louisiana. And that particular position is . . . . We're satisfied that it's workable — we're dealing with the problem.

(Mr. Leach) Then your statement to declare this as a modification not an abrogation.

(Mr. Tauzin) That's correct and the jurisprudence makes that distinction.

(Mr. Leach) We're going to interrupt this line of questioning for just a moment cause I don't want to keep the director of the bond commission here unduly. Mr. Ackal was concerned earlier as to whether or not the — what percent of the bonded indebtedness of Louisiana can

be recalled — paid off early. What is the status? You want to raise your question again, Mr. Ackal?

(Mr. Ackal) Basically, the chairman just said that approximately — it is my understanding that the vast number of bonds are not able to be negotiated earlier than the contract calls for. Do you have any idea approximately what percentage—

(Mr. ?) Yes. When we issue debt, the standard provision in the contract that we have with the bondholder calls for a length of time during which the bond will not be called. In other words, they cannot be purchased by the state from the bondholder — mandatory purchase — during the slated time and after that length of time then you have a varied percentage that you will pay to the bondholder for his bond. The standard length of time that we use in ten years. In other words, we issue a bond now we cannot mandatorily make that bondholder come back to us with his bond and us buy it from him — until after the 10-year period is gone. Now, we can purchase it on the open market, of course, or we can — passed a bill out of here yesterday which allowed money to be put in trust to . . . bonds and we can do that. But we cannot make that man bring his bond back to us the year before that 10-year period.

(Mr. Ackal) In other words, what you're saying, majority of the bonds that we have right now that's outstanding is based on the 10-year premises of—

(Mr. ?) Right. Now of course, that's correct and we've been issuing . . . serial which serially for the last numerous years — Of course, we'll have a lot of bonds maturing every year and a lot of bonds reaching that 10-year point every year. So, there are a lot of bonds that we could buy right now or that we could call right now.

(Mr. Leach) Thank you. Mr. Champagne wants to ask one question.

(Mr. Champagne) You don't see any real problems though if we had the money . . .

(Mr. ?) Yes, sir.

(Mr. Champagne) . . . you could pay off a lot more when you got the money?

(Mr. ?) Oh, absolutely.

(Mr. Leach) Any other questions? Thank you, Mr. Korans. Any members of the committee have any questions of Mr. Tauzin or any of his staff before we start the opposition?

(Mr. Tauzin) I do want you to hear from one individual, Mr. Chairman. We received testimony before the Natural Resources Committee about the problems of the citizens of this state . . . about to incur as a result of federal policy and . . . of Louisiana that bears a relationship to the way and the manner in which we provide energy to the rest of the nation. I would like for you to hear Mr. Charlie Smith of Cajun Electric on that particular point.

(Mr. Leach) All right. Mr. Smith speaking in favor of House Bill 768.

(Mr. Smith) Mr. Chairman, as Mr. Tauzin mentioned — briefly, several weeks ago I appeared in behalf and support of strip line legislation. And one of the reasons for that particular appearance . . . asked me to come here today and give you some of the facts that we have . . . for a number of years relative to taxes that Louisiana people will be paying starting on Jan. 1, 1979 for its coal imported from Montana. Some six months after we executed a contract with Shell Oil Co. the state of Montana levied a 30% severance tax. The additional taxes of — predicated on the total tax paid were some . . . 5% tax and of course the federal . . . taxes for that are simple. So, we're looking right now at 35% tax that's really a use tax of the coal and value of the coal that we buy delivered in our coal . . . in Montana. At the present time we've contracted 6,000,000 tons of coal a year and the severance tax or the sales tax really on this coal in the state of Montana is $2 a ton and that'll be $12,000,000 a year that the 900,000 people in Louisiana that we will be serving

this electricity we'll be paying for. We're talking about — course we have a contract now with a . . . major energy company for our natural gas . . . is less than 30¢ per thousand — 30¢ per million BTU. This coal . . . fuel will run in New York at a $1.40 to $1.50 per million BTU and we feel, and, of course, there are other states that we are going to contract coal from — the state of Wyoming and others and they are also adding these taxes on the value of their energy being shipped out.

(Mr. Leach) Thank you, Mr. Smith. Mr. Jimmy Morris would be La. Assn. of Educators that signed the card to speak in favor of this bill. Mr. Morris. Jimmy's not in the room at this time — we will move then to the — I'm sorry but I'm told there's other cards here that — Mr. Brooksher, are you wanting to organize this the opposition to this? We want everyone to have ample time to state their opinion — their statements. We would hope that we wouldn't have to go through the repetition of some of the same arguments. I recognize that each person has an interest to represent here. Would you like to lead off and then we'll take it from there?

(Mr. Brooksher) Thank you, Mr. Chairman. My name is Bob Brooksher. I'm with the Mid-Continent Oil and Gas Assn. I have today a prepared statement for you because I think it's important that we put everything together and I probably put my thoughts together in this prepared statement so that if you want to interject a question at any place I can pick up where I left off easily. The proposal by Mr. Tauzin as he has explained to you is an attempt to levy a first use tax on natural gas produced off-shore Louisiana in the federal zone and brought into Louisiana. This idea was first conceived in this state about 10 years ago and various efforts to make it constitutional it had been changed considerably to take the shape of the present bill and some of the bills that go with it. In all the forms that this bill has taken through the years . . . from trying to pass the bill have said it's constitutional and those that have opposed it have denied the constitutionality. I think the same applies to this bill. Although this committee and

its present members have heard details of this proposal and our opposition to it on several previous occasions I would like to briefly repeat the factual situation that you've already heard today and which we must deal in this issue, if I can be brief with it, so that I can explain to you just where we are. Off-shore federal zone gas is produced and owned at the time of production by producing companies. At the off-shore platform in the federal zone where the gas first comes to the surface the gas is purchased by a pipeline couple and the pipeline company takes possession of it at that point. Because it's in a federal zone the gas is immediately in interstate commerce. It doesn't have to come to Louisiana to be in interstate commerce — it's in a federal area to become interstate commerce. But, it's transported from this platform, usually in the company's pipelines, usually to an on-shore gas processing facility and then after it leaves the processing facility it goes on to the final pipeline customer. The producer, as you've heard today, although having sold the gas, has, by the contracted sale, retained the right to remove the liquefiables but he has agreed to bear all costs connected with this removal. When the gas arrives at the processing plant — this processing plant, mind you, is owned by a producer or a group of producers usually. The producer removes these liquefiables, which are approximately 4 to 6% of the total volume of gas and these end products — that's the propane, butane, ethane, natural gasoline — are sold mainly to Louisiana customers. The processed gas remaining — about 94-96% of the total gas volume in the plant is returned to the pipeline company and transported to its ultimate customer, usually and by and far largely some customer out of the state of Louisiana. Now, these aforementioned facts that I've told you apply to about 80% of the off-shore federal zone gas. Yes sir?

How much of that gas goes out of the state? You said a great deal of—

(Mr. Brooksher) Probably — I think the Revenue Dept. has indicated probably maybe 98%-98½ I think they've

said. We won't argue with that figure. By and large the great majority. That's what . . . when they talked about Bagert's bill. Bagert's bill is to take care of those people who . . . We won't argue with that fact. But some of this gas now, of this 15 to 20% I'm talking about is brought in Louisiana in pipelines that are owned by the producer and it isn't transferred to the pipeline company till after it's processed or what we call the . . . in Louisiana. Some gas, and this is 1½%, is probably bought in Louisiana for use in Louisiana by Louisiana users. However, all these exceptions to the general rule don't apply to over 20-25%, probably about 20%, of the total gas produced . . . . So, the owner of the gas we're talking about — the owner that the bill refers to we're attempting to tax here is Interstate Pipeline Company in about 80% of the cases. It is this entity that must pay the tax levied in this bill because it is the owner of the tax at the time the first use occurs, whichever use it is, in Louisiana. The careful attempt to tax the owner is purposely made in hopes that the owner will be permitted to pass this tax along to the ultimate consumer somewhere out of Louisiana. Now, this can be done if the pass on is approved by FDRC, formerly FPC. Because this is not a separate production or other similar tax, the pass on is not an automatic approved thing and as you heard earlier today must be considered in the cost of service and a rehearing held in order much the same as any other pipeline rehearing. Because the obvious attempt here is to levy a tax in Louisiana to be borne only by those people out of the state it is my personal opinion that politically the federal government cannot allow this result at the FDRC level. This is the same problem that the producing states have had and the producers, among those I represent, have had and we've been saddled with together. There are too many voters in the consuming state. Now, we don't like that particularly, but that's a political reality and we have to face it. When this pipeline—

(Mr. ?) Excuse me, Mr. Brooksher. Mr. Dunn?

(Mr. Dunn) Do you mind if we interrupt—

(Mr. Brooksher) No, . . .

(Mr. Dunn) I'm really trying to understand that. What is your answer to the coal situation that they pointed out just awhile ago where we're paying excessive taxes or prices for coal that we get . . .

(Mr. ?) I agree — they ought to keep their coal and we ought to keep our gas but that's not the way it works—

(Mr. Brooksher) Well, let me say this. You have a perfect right to levy a severance tax and you levy a severance tax which is added to the price of gas produced in Louisiana — like they're going to their coal. The only difference in the situation is that in the price of gas you have a federal government control on the price of gas and there's a limitation to what you can sell it for. Just like we have a limitation on the price of crude oil — the FPA sets it. Coal has no price controls, as I understand. So, whatever they levy is going to be automatically passed on. Now, in the cases of severance taxes levied on the gas produced in Louisiana much the same as their coal produced in Montana, you are levying the severance tax and that is being added to the cost of the product, in most cases. If you talk about your interstate gas price right now, your interstate gas price right now is roughly $1.46, we'll say — somewhere along in there — plus severance is the way they say it — $1.46 plus severance is severance tax. So, we are, on the gas that's produced in Louisiana much the same as the coal that's produced in Montana — we are getting the tax and the tax is being added on to the cost of it. What we're talking about here is the tax that's being levied on something outside Louisiana — that passes through Louisiana — not that's produced in Louisiana. Now, that's the best distinction I can be able to make of it, Mr. Dunn. But, when this pass on, as I contend that it's going to be denied, this pipeline company has to look somewhere else for relief. It has two options I think will be pursued simultaneously — maybe more. Inasmuch as the owner of the pipeline company must pay the tax, it can do so under protest, as Rep. Bruneau brought out —

one of the ways. And then, it has to bring a suit — I think he as 30 days in which to bring the suit — then it will bring its action tested constitutionality . . . of the bill. At the same time, it could also do this. Inasmuch as its selling its gas or buying the gas from the producer and he has a contract about that we mentioned about the processing, it could claim possibly that this tax should be borne by the producer and . . . immediately withhold that much money or miss payment to the producer for the gas. I don't know — I just pose that as a possibility. But this would only be done because of this contract that I mentioned to you that provides for the producer to bear all the costs of processing. The pipeline company will, in its allegations, be stating that the first use tax is really being levied on the processor and the money that they're paying, I think, Mr. Bruneau, under protest, is held in escrow by the Revenue Dept. . . . without regard to your tax on — when you're withholding it for the trust fund. I think if you pay the tax under protest it is held in escrow automatically. To prevent the pipeline company from demanding this payment from the producer, Sec. 1303, Paragraph C carefully repudiates the aforementioned contract. . . . objection to my use of the word but I think that's what we're doing here. Most people would agree that there's a constitutional question here. A lot of people agree that it's unconstitutional. I was interested to hear what Professor Dakin had to say but — on the constitutional issue — but we didn't hear that. Just let me read the sections of the constitution that we're concerned about, if I may. The United States Constitution says no state shall enter any treaty, alliance or confederation to grant letters of mark and reprisals, coin money, emit bills of credit, make anything but gold and silver coin to tender in payment of debts, pass any bill . . . ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility. Now the people of Louisiana felt so strongly about that and they liked that so well — mind you this is the federal constitution prohibiting the state from doing something — that the people of the state of Louisiana, in 1974, adopted in their constitution a proviso that says no bill . . . ex post facto law, or

law impairing the obligation of contracts shall be enacted. Yes, sir.

(Mr. Bruneau) Well, I wanted to direct the attention, Mr. Brooksher, to that language . . . . Why didn't you term that a modification or an abrogation that would still be . . . no matter which term you use. Would it hurt?

(Mr. Brooksher) I think so.

(Mr. Gunter) . . . How would this — uh — what would be the difference in a first use tax and a road tax? Say like we buy a tank of fuel in Texas and we come through Louisiana we . . . .

(Mr. Brooksher) Well, I think the tax there is levied on the use of the road and that's been okay as far as that goes.

(Mr. Gunter) Idon't—

(Mr. Brooksher) Let me tell you the difference in the tax, Mr. Gunter. You're collecting ad valorem tax right now on a pipeline that carries this gas. You don't but the state does. But each parish on which these pipelines go through they collect an ad valorem tax on the pipelines. That is considered a different proposition than what we're talking about here. That's been long held to be constitutional and all but there's a difference — a different factual situation — a difference of the position. It's been accepted and it's being done. But let's see where these facts take us to — where we've gotten. I think Rep. Tauzin and those people who have worked on this bill have done excellent job in trying — and a sincere job — in trying to enact a legislation to do exactly what they'd said. And they have made serious attempts to keep the ultimate burden of this tax off the pipeline company, off the producer, or the Louisiana consumer. But, if just will not work. First place, . . . is not going to let them pass gas . . . be passed through. That's my personal opinion. It cannot be done. The tax, I think, is going to be ruled unconstitutional for uses — most of the uses — that you've got here. If there is

a constitutional use it's probably the process. That's the only real use that you've got in the bill. You start transportation. If transportation, to a point, can be taxed, why can't you tax it all the way through to North Carolina or New York? Every state it goes through is going to jump on this bandwagon and tax that transportation. So, you've got to come up with a use, I think, better than transportation.

(Mr. Bel) Two things that — which you just said — I don't know quite how to handle. You said that you don't think that first use . . . . How can we get a determination from them unless we have this bill?

(Mr. Brooksher) I don't think you can. Just like I don't think you can get a determination from a . . . without some levy of the tax. As far as that goes, I think that same thing applies to the constitutionality, Mr. Bell. I think that if you look at — I'm going to cover it just a little bit later here but I'll cover it right now. I think you are political realists. I think most of you people here are here because you're political realists. You understand the politics . . . . Now, can you see, and I respond to the question, can you see how the federal government, that has an opportunity to take some administrative action not before a court, can allow a state to levy a tax to be paid wholly by the people outside the state? That's about the best way I can — I didn't mean to ask you a question — I'm trying to answer your question as best I can. I just can't see that. You know, I told you that's my personal opinion.

(Mr. Bel) Well, again, . . . unconstitutional, well . . . about the stevedore's tax being applied in the state of Washington — they held it unconstitutional in 1937, again in 1947 and this time on an 8-0 decision they reversed themselves.

(Mr. Brooksher) I think the facts, as I would say, I think the facts in the stevedores case, I have no quarrel with the fact that the United States Supreme Court has been . . . its issue. But I think if you look at the last two paragraphs

— same article that was quoting Fred Ellis — you'll notice that Ellis makes reference to the politics in the Supreme Court decision. And that's what I'm talking about.

(Mr. Bel) But don't you agree that as politicians in Louisiana that we are to provide . . . and of course the opportunity to deny us the money that is due the citizens of this state?

(Mr. Brooksher) Well, I would like to see Louisiana get all the money to which it's entitled. But what I'm going to spell out for you right now is how I think this is going to work and I don't know whether that's what you want. I think I'll answer that question right now in where I'm going. Now—

(Mr. Guidry) You, as far as I'm concerned, got to the heart of the thing a while back when you — in the definition of the word "use" the activity that's going to be . . . requiring the — give a new definition to the word "use". At least we've got eight different activities which are defined as used and you said that you felt that there was only one of those activities which you thought might . . . the court would accept. Is that what you said?

(Mr. Brooksher) Well, I say of all the uses there — let me re — I said that, I didn't really mean it. What I'm saying of all the uses that is there the only one I think that might have a chance to be . . .

(Mr. Guidry) The sale, would not, in your opinion, would not . . .

(Mr. Brooksher) Just a mere sale, huh? . . .

(Mr. Guidry) . . .

(Mr. Brooksher) Well, you got — the way they define processing here — I think they have two steps to the processing. You can take out what we call liquids, which is . . . and I think that's what you're referring to. That might possibly be sufficient activity to . . . . The processing I'm really talking about though in addition to that is the big processing you do which is comparable to a

refinery operation. It's more than a mere separation of the gas . . . liquid. This is a complicated process which involves . . . lots of things to take out . . . propane, butane, ethane.

(Mr. Guidry) Let me ask you — what percentage of that off-shore gas coming through here is subjected to those uses . . .

(Mr. Brooksher) I say about 80%. In fact, I say virtually all of the gas that comes off-shore is processed in Louisiana.

(Mr. Guidry) So it's very well that we could tax it — constitutionally based on that view. Is there any way that this activity could be transferred to another . . .

(Mr. Brooksher) I think it could but I don't know whether you — I mean what is . . .

(Mr. Guidry) It's not economical. I understand. You think they wouldn't move away just because we . . .

(Mr. Brooksher) I don't know if they're going to move away but . . . To continue — the factual situation — the producer, in the case I've outlined to you, it's only about 5% of the total gas . . . . This transferred to these liquefiables I told you about — butane, propane, ethane, natural gasoline. Now mind you, if the producer pays this tax you're talking about 5% of the product bearing 100% of the tax. You're gonna tax the full stream that enters that plant, that comes in. If the producer has to bear it the only place he can get his money is from these liquefiables which only 5% of it. This could mean, we've had some people figuring in this, propane and butane could increase in price by 33⅓% if the FEA would allow the price increase. That's controlled by the FEA. Ethane . . . are not controlled but marketing conditions in Louisiana today probably would not allow this to be passed on. You just couldn't sell it. There's a flood right now of ethane. But if all these prices could be increased it's our contention that the cost would go to the Louisiana consumer. Much of the propane and butane increase would be borne by the

farmer and the ethane increase by the chemical company. Billy mentioned that a lot of this ethane — I mean a lot of this propane and butane goes into refineries. He also mentioned to you that a lot of propane and butane comes out of the refineries. So I suggest to you that it's not very probable that the propane and butane that comes from these gasoline plants is going to be put in the refinery and the refinery propane sent out to the consumer in Louisiana. Most of the propane and butane produced in these plants, I'm told, is what you'd fine — or most of the propane that's used in Louisiana but a . . . come from these plants is what I'm saying. But if the producer is prohibited by the . . . or by the FEA from passing along these costs, maybe these gas . . . are going to become unprofitable. You may not just move the plant — this could cause the closure of some plants, a job loss, and a loss of the plant products for this state. Mind you, as the price of gas increases, right now, without benefit of this tax, as the price of gas increases it becomes less and less advantageous for these liquefiables to be processed. And by adding this on there you shorten the life of these plants . . . this for Louisiana. The pipeline companies would welcome this — these liquids or the liquefiables I guess is a better word. They would increase their BTU output and they sell their product at the end based on its BTU output. But how about — we talk about the producers and Billy has indicated that by the bills that were passed yesterday — Rep. LaBorde bill — that this will make the producer whole if he has to bear it. I think that is a sincere attempt to do so and we certainly appreciate it but I would suggest to you two things— First, and he had mentioned this to you too, in many cases the producer off-shore is not necessary the high severance taxpayer in Louisiana. And whereas he gets a credit for his severance tax the tax bill he pays on the first use tax may be more than his severance tax — in many cases is more than his severance tax and as the production in Louisiana goes down and is reduced you have more chance that that producer is not going to be made whole and . . . . Secondly, House Bill 1187 provides a credit. We appreciate it, mind you, but as

you have seen in the past and we have seen in the past these credits that we talk about had a tendency to leave us from time to time. One legislature passes a credit and the next one says look at this exemption we're giving or look at this credit we're giving and they often they want to repeal it. I'm concerned about what could happen in this instant. This may be a temporary washout as Mr. Tauzin said, but we're concerned about how long it might last.

(Mr. Leach) Mr. Bruneau, we're not going to ask for . . . the last repeal of exemption bill. Go ahead.

(Mr. Brooksher) One other thing ought to be mentioned. It is long been the practice of the FPC and now the FDRC to approve gas sale contracts where the producer retains the right to process for the liquefiables. This part of the contract is usually not been considered — they been talking about price more than anything else when they consider it . . . this contract had been in there. There have been some recent actions before the FDRC where the northern consumers are asking that these contracts not be approved — that the FDRC reject the new contracts that allow producers to retain the right to process. I tell you that any action that Louisiana takes now in this regard could cause this to be a much more serious consideration by FDRC in the future in connection with those contracts. As the shortage of gas intensifies the probability of the requirement the liquids . . . intensifies also. And I think when you're trying to tax this stuff and pass it on it causes those people up there to think more about it. I'm talking about the FDRC people. This latest attempt to tax gas produced off-shore in the federal zone, I say, applies — indicates to you that are square in the face and a political reality. The OCS Lands Act simply prohibits the state from taxing this gas. That's the reason they call it use tax. However, I don't think that many courts that allow you to do indirectly what they prohibit you from doing directly. So, I think that should be considered. I think they've made this exactly the same as the first use tax in talking about competition, fairness, and things like that. I don't think we'd want to look at it that way. My contention then

today, gentlemen, is in the alternative. Taxes unconstitutional are in violation of the Outer Continental Shelf Lands Act, or, despite what Mr. Tauzin has done, I say they're mighty fine efforts to attempt to prevent the producer from bearing the tax if it is constitutional and if this levy can be made upon this process it'll be borne by this producer and not passed on to somebody . . . but, where possible, passed on to the people of Louisiana. We talked a lot about constitutionality here before you today but I'd like to mention one other way the federal government has to retaliate. I don't like it, perhaps, but it's here. One example, several years ago New Mexico passed a tax providing for levies on production of electric power. Now, they had a power generating plant which I think came from a dam — water going in there generating power and part of that power went outside the state. So, New Mexico levied a tax then turned around and gave a credit in exactly the amount of this tax to the people in New Mexico for their power use. This effectively exported the tax. Now I'd like to read for you from the Tax Reform Act of 1976, as passed by the United States Congress and how they reacted — No state or political subdivision thereof may impose or assess a tax on or with respect to the generation or transmission of electricity which

against out-of-state manufacturers, producers, wholesalers, retailers and consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce. Congress there reacted by passing a law prohibiting what New Mexico had done. I would also mention to you that in 1975 the state of New York, I don't know when it was, but the Congress, in 1975, passed a similar law outlawing tax in New York on the transfer of stock. They did it the same way. So, what you're doing here — attempting to do what they've done elsewhere and you're . . . — I don't know whether I should say that — I don't think anybody could say this for sure and I wouldn't want to say it — this is

another way, not regards to constitutionality, the federal government can retaliate. There could be several others. For instance, how will Congress react to the treatment of the natural gas bill presently before that body? Apparently there are some people in Congress today who don't sympathize with the producing states nor with the producer. They could react and do something about allocation of interstate gas — intrastate gas. Or deal with the most recent problem in the federal tax proposal. How might they react to the issue of the severance tax? This is still in conference committee. Senator Johnston held out strongly and was able to get this severance tax added on as a proposal in the bill. I say that's a temporary measure cause the bill hasn't passed yet. We hope this bill that you're talking about today will not cause the conferees to change their minds on this severance tax issue. You mentioned before, and let me just hastily conclude here, about the dedication of revenue. I would suggest to you that the constitution of Louisiana provides that all monies go into general fund and no appropriation of the legislature can be for longer a year. And I think, regardless of what you try to do with this bill, I think that next year the legislature can undo every dedication that you make without . . . . No need shown for tax at this time. Only because this tax proposes an idea or method or way to tax out-of-state gas consumers do you give any consideration to it. It won't do this, I say. You're scared it's going to work to the detriment of the state or to the producers who are producing a critically needed energy source. This isn't the time to place additional burdens on people of this state or those producers who are trying to keep this country operating with an adequate energy of . . . . I submit to you, gentlemen, that you do not need a constitutional lawyer to recognize the perils of this legislation. I say that the federal government will retaliate. What we need from you today is a joint effort to overcome all our problems. We in the energy business are working to do all we can to overcome our energy problems. Don't tie this stone around our neck now because it won't help — but that's what you'll do if you pass this bill.

(Mr. Ensminger) Mr. Brooksher, do you feel this bill is unconstitutional in your . . .?

(Mr. Brooksher) Mr. Ensminger, I said I have some questions about its constitutionality. I think there's a possibility that the processing in Louisiana could be a constitutional point. That's the problem—

(Mr. Ensminger) Do you think it will be tested on its constitutionality?

(Mr. Brooksher) Yes, sir, I would think so.

(Mr. Ensminger) How long do you think that would take?

(Mr. Brooksher) Well, I would say they could probably do it in three or four years but I don't know. The lawyers tell me that's about what it would be.

(Mr. Ensminger) Three or four years — So, really, even if we pass the bill it's not going to have any effect on you until three or four years from now, right?

(Mr. Brooksher) Well, I don't know that I quite agree to that. I think what's going to happen on the effective date of the bill somebody's going to have to pay some taxes. And that's money that's going to have to be paid out — now whether it be the — we've got some questions here and people arguing about whose going to be paying that amount.

(Mr. Ensminger) That would just be a poor savings account, wouldn't it?

(Mr. Brooksher) Well, I don't know whether the interest that Louisiana pays is as good as you get somewhere else. I don't know whether a lot of people have that kind of money to put up. We're talking about several hundred millions of dollars.

(Mr. Ensminger) Then, in case the bill is — provided that it is constitutional, then you would have questions of whether the credit we've allowed in Louisiana . . . Louisiana users could be held constitutional, right?

(Mr. Brooksher) No, I don't think I would . . . the constitution . . . give the credit. My problem with the credit is just that — it's a credit. In the first place, by the time you got 4 or 5 years going by and the production in Louisiana has gone down, the person that pays first use tax or pays on off-shore production which is going up — so the tax they're going to be paying is more than the severance pay that they pay in Louisiana. So they can't get that much credit to start with. Then, secondly, I'm concerned that a future legislature is going to leave this credit there.

(Mr. Ensminger) Okay. Suppose if there was no credit given to any to provide for Louisiana uses what percentage of this tax would be paid by the people of Louisiana directly?

(Mr. Brooksher) Well, I think that has a lot of problems with it. We'd say the total tax — attempt would be made to pass the total tax on to the users of ethane, propane, butane and natural gasoline. Not all of that is used in Louisiana — a lot of it is — I can't tell you exactly how much. But a lot of it is. Now if the FEA would allow that to be passed on all of the tax that could be would be passed on to that.

(Mr. Ensminger) What is the worst — what percentage or what amount dollars if we're talking about — what do they project . . . will generate at the present time?

(Mr. Brooksher) I think they said $170,000,000 and I would say probably you're talking — could very well be talking about at least $100,000,000, maybe more, I don't know.

(Mr. Ensminger) What — it would be passed on to out-of-state or what would be used in Louisiana?

(Mr. Brooksher) In Louisiana — I think that's where you've got it.

(Mr. Ensminger) A hundred million dollars? But that is the amount of tax . . . small percentage of that is sold in Louisiana.

(Mr. Brooksher) I said a great percentage of that is sold in Louisiana. I think Rep. Tauzin and I disagree on that point.

(Mr. Ensminger) In other words, you're saying $100,000,000 out of the $170,000,000 could possibly be paid by Louisiana taxpayers?

(Mr. Brooksher) That's off the top of my head but — plus I don't know. The producers of Louisiana . . .

(Mr. Ensminger) What I'm trying to get down to — do you feel political realists and we being somewhat the same type gets down to the constituents or the voters — you've talking about the corporations would pay $100,000,000. How much of it would be passed on down to the ultimate users of the product?

(Mr. Brooksher) Corporations or whoever that produces is going to pay all of it. Now, I'm saying out of that all of it — out of that 170 we're probably — we could possibly be talking about 100,000,000 going to the Louisiana people.

(Mr. Ensminger) People or corporations?

(Mr. Brooksher) Well, some of that is going to . . . and it goes to corporations — chemical companies — which creates jobs, you see. But, I think you got, in addition — don't overlook the problem you have that if — that the FEA says you can't pass that on, that propane and butane increase. Now, that's where you got some real problems that the producer has to eat the tax. You may not be concerned about it, but he can't operate his plant if he has to eat the tax. We're going to have one company to testify in a minute to tell you how many plants they'd have to close if they have to eat the tax. Now that deprives the state of the end product of this liquefiable — of this gas if he had to do that. So not only are we talking about possibility of passing on the tax to the consumer of Louisiana we're talking about another possibility — a distinct possibility — that the consumer won't have the product.

(Mr. Ensminger) But what I'm trying to get at — maybe I'm not making myself clear — but what the ultimate consumer — that man that turns on his lights, drives his automobile, and uses the end product — how much of this $170,000,000 would be used by the people of the state of Louisiana?

(Mr. Brooksher) Well, let me say this about it — the only thing that that person uses is the propane and the butane and that's just a part of it, you see.

(Mr. Ensminger) We've excluded the generating plants for electricity, etc. in this bill, right?

(Mr. Brooksher) Right.

(Mr. Ensminger) —that used the gas? . . . utility bills. What about the man . . . gasoline prices?

(Mr. Brooksher) I don't think it would affect his gasoline prices.

(Mr. Ensminger) Okay — so to get back to what you were trying to tell me — you repeat the words the propane, the butane, the ethane, etc. like . . . would be the only products that we would fill as the ultimate consumer in Louisiana?

(Mr. Brooksher) I think that's right.

(Mr. Ensminger) And it's no way . . . that that would be $100,000,000 for the use of those products, is it?

(Mr. Brooksher) I think it would be. You're talking about—

(Mr. Ensminger) In Louisiana now?

(Mr. Brooksher) I'm not talking about — I'm talking about — you said ethane . . . the little guy that drives the automobile doesn't use ethane. That goes to a chemical company.

(Mr. Ensminger) Okay. If that chemical company did manufacture a product some of it is going to be sold in Louisiana, some of it is going to be sold in other states,

right? So, it's not coming back to Louisiana. What I'm trying to ask you — have you all thought about what $100,000,000 is going to borne by the people of the state of Louisiana?

(Mr. Brooksher) I can't tell you how much — I can tell you if the price

(unknown) I'm not going to argue to the point that it's going to be all that to the individual — that's not true — it's not all going to this little man, this little individual, but the tax on — if it falls on these liquifiables, the person who produces the liquifiables is going to try to recover any money. Whoever buys it — those people are in Louisiana, but not all of them are little people that drive cars that use butane.

(Mr. Leach) Alright Bob, I think we've got that point that's going to be made. We've now used up 35 minutes of the hour on the opposition of the bill. Mr. Champagne has a question. We still have nine witnesses to appear in opposition to the bill.

(Mr. Champagne) It seems to me, though, what you take — the assumption you making the hundred and seventy million is that your statement before that the only thing that the tax could be on would be the hydrocarbons, what's taking from it. You overlooking the fact that presumably, I think the bulk of the tax if it's constitutional and so forth and so on, would be paid by the gas that goes out of state . . . . the hydrocarbons. I think in answer to Mr. Ensminger you're assuming that the only part of it that might be constitutional is the one where you extract and you would put all the tax on what you extract from the gas. But really, I think they propose to get the bulk of it from that gas after it's extracted and it . . . forward.

(unknown) But, I think Mr. Ensminger understood this point. We're talking about only if this whole thing stays in Louisiana if they don't allow this to be passed on. My intention is that they will not allow it to be passed on.

(Mr. Champagne) Well then there is no way they can get a hundred and seventy million dollars out of it. That's what they propose to get out of the whole thing. But if there is no way they can get that out of it, if they . . . . It's got to be less than that. Because the proposal as it is assumes they are gonna get a tax on that when it goes . . . .

(Mr. Leach) Any other questions to Mr. Brooksher?

(unknown) The tax, Mr. Champagne, is gonna be levied on a hundred percent of the gas . . . and because of this contract that the producer has where he has to prepare the cost of it, then I say that the liquifiable are going to bury the total burden whatever the tax is.

(Mr. Leach) OK, no other questions of Mr. Brookshire. Thank you for appearing this morning. Mr. Ed Steimel from LABI.

(unknown) He said he will be back later.

(Mr. Leach) After the bill is passed or—. OK Mr. Truman Woodward representing Exxon Company. Mr. Woodward.

(Mr. Woodward) Mr. Chairman.

(Mr. Leach) I'm sorry sir, now I have a card here from Mr. Woodward and a Mr. Godbold, Alpen, Patrick. I was trying to take these in order but you all would like to make a joint presentation. OK, Mr. Woodward was the one that was recognized. Do you Mr. Woodward want to turn this over to someone with Exxon?

(Mr. Woodward) If I may I would like to just make one . . .

(Mr. Leach) Alright, you pull the microphone up please, and I'm asking the audience and the committee to please help us now as much as possible to move as expeditiously as possible. I know each of you have some very important — to state and we would like to hear it. Let's try to pay attention so perhaps we won't have to cover the ground a

second time. Go ahead sir. Identify yourself for the purposes of the record.

(Mr. Garner) Mr. Chairman and members of the committee, my name is A. C. Garner, Jr., manager of the Southeastern Production Division of Exxon Company, U.S.A. The Southeastern Division is headquartered in New Orleans, Louisiana and encompasses Louisiana and the southeastern part of the U.S. along with the Gulf of Mexico OCS . . . . We appreciate the opportunity to appear before you to discuss Exxon's views of the proposed First Use Tax. In recognition with . . . bill I have with me a group of associates who . . . in specific aspects of the operation. . . . Mr. F. S. Godbold on my left who is qualified to speak on legislative . . . processes; Mr. Chuck Aplen who is in our natural gas department, sales group and . . . without contract division regarding sales of natural gas and federal . . . procedures.

(Mr. Leach) Excuse me just one moment. Would you turn the mike up. Sir if you could pull the mike — we are not able to hear you now.

(Mr. Garner) I'm sorry. Can you read me now?

(Mr. Leach) Yes, if you will speak into the microphone we can all stay alert here.

(Mr. Garner) Very good. Mr. Bruce Patrick on my right who is a tax attorney from our headquarters tax department in Houston and Mr. Truman Woodward, senior partner in the New Orleans law firm of . . . I brought these gentlemen with me today in an effort to provide you with answers to questions that may arise during the course of the testimony. We really have five points that we would like to discuss in this, major provisions of the House Bill 768 in the opinion of our legal council violates both the U.S. and the Louisiana constitutions Mr. Woodward will expand on this in a moment. If the bill is ruled constitutional in certain parts, most of the economic impact of this proposed legislation will eventually come to rest on the producers of the OCS gas. In this case, the impact on Exxon would be in the neighborhood of about

twenty-two million dollars for the year 1979. This would become more severe over time . . . Thirdly, aggregation of contracts and application of discriminatory credits, the two remedies proposed to litigate potential economic impacts will likely not achieve their objectives. With the probable failure of the remedies, the ultimate impact will fall largely on Louisiana consumers or producers either as a result of higher prices or reduced . . . Lastly, the provision of House Bill 768, which legislatively aggregates certain bonafide provisions between private parties along with the requirement of House Bill 1187 making service tax credit depend upon a certain committee proceedings would encourage retracted and costly litigation within the Louisiana Gas Industry. With these points in mind, we would like now to expand them in order to address the constitutional issues, I would like to call on Mr. Truman Woodward.

(Mr. Woodward) Gentlemen, I've been with the firm . . . and it's predecessors for fifty years. It was an old firm when I first became associated with it. I am now one of the two senior most partners in that firm. I'm a past president of the Louisiana State Bar Association. I have been on the council of the Louisiana State Law Institute for twenty years, and I am now the vice-president of it. I am a member of a number of professional organizations and I am president of the Louisiana State Bar Association. I have appeared before the . . . in many federal courts many times on constitutional issues, presumably because of that the Supreme Court of Louisiana has asked me to represent it on a number of constitutional issues in the federal courts. I have done so and I am glad to say successful. Mr. Brooksher has touched on some of these constitutional matters and I think we have to go to them more in depth than he has. There are a great number of issues before you but I'll try to hit the high spots and do it as quickly as I can. First, we have a question of whether or not the tax itself is constitutional under the interstate commerce clause. Historically, the constitution of the United States originated because of the fact that the states

throughout the . . . were imposing duties and imposts on the products of each other. The primary purpose of organizing constitutional convention and having the constitution adopted was to eliminate that which was destroying the commerce between the states. The constitution mentions no words in saying that the right to regulate interstate commerce shall belong to the commerce of the United States. Based upon that we have had tremendous mass of . . . during the years. It started with the realization that there must be some basis by which the . . . could be taxed so that the states could receive the cost of the benefits they gave to the movement of the commerce and hence you're permitted to tax the pipeline in which passes in the railroad tracks in which it moves and the court has gone so far as to say that if interstate commerce halts in route for storage longer than just for loading from one freight car to another or on the ships that can be taxed because there is a . . . of the industry of commerce. And the court has also said that if the procedure if any of the products are halted for manufacturing purposes and they go through a manufacturing process that halts them . . . and the question has always arisen in each of these cases and throughout the years where various states have attempted to levy some taxes on these various products and there have been a multitude of cases and each one of them the United States Supreme Court had to go through the problem of determining the problem of determining the problem on a case by case basis. So, in the last two cases that came up, which were the Auto Transit Case in Mississippi a year ago and Washington . . . Case, Mr. Bel mentioned that was decided just a few days ago the court laid down four rules. Each one of these rules was a recognized decision of a prior — in a prior case by the court — Supreme Court of the United States, in which they said that these are the various things that must accompany the right of the state to legislate your tax. It said they must be — meaning your connection with the state, the state can't levy a tax unless it has some connection with the fund. There must be a fair relation to the benefits, there must be no discrimination, and the tax

must be fairly apportioned. Now, in these two recent cases, they said that all four of those facts must exist. Not just one of them, not two or three, every one of the four has to exist before a state can levy a tax on interstate commerce. Now remember that the tax that is being levied here in on a product that comes from outside of the state, into the state, and is in the same condition as far as commerce is concerned as interstate commerce, as far as the products moving from Texas into Louisiana. The state of Louisiana now as you have heard has the minimal uses that are being that are being sought to be taxed. And when I say minimal uses, there is only one or two. One is manufactured — manufacturing of the gas if it goes into the point where it is consumed certainly it is subject to a use tax, and certainly if it is stored here it is subject to a use tax. If, providing of course, that there is no discrimination and fairly apportioned and if there is just a relationship to the benefits, but that is where we come to the question. Before I even mention the question of processing, let me just point out, that in every one of these cases where these taxes have been permitted, the tax was levied on intrastate commerce as well as interstate commerce. This tax does not seek to impose any tax on the gas moving through pipelines that's produced in Louisiana. It doesn't seek to tax any gas that comes from Texas or any other states into Louisiana or through Louisiana and hence, there is latent discrimination in this case because these . . . this particular package of taxes does not apply equal. It is a seven cent tax that is sought to be levied on gas to come from the Outer Continental Shelf. It doesn't apply to tax to products moving in the same relationship on gas produced in Louisiana. It doesn't apply to gas coming from other states and having the same minimal . . . effect as the — it only applies to gas coming from the Outer Continental Shelf that is in direct violation of the specific language of the United States Supreme Court has used in every case including these last two and I don't want burden you by reading it to you, but I assure you that both Mississippi and Washington, where the . . . case was decided a few day ago, levied the same tax on intra state activities as it

did on interstate activities, and in every other case where there has been an interstate commerce tax upheld, it has been where this occurred. Now, let's talk about processing just a moment. I disagree with Mr. Brooksher that processing is a halt. It runs through, all the way through, and it never halts. The process continues. The gas is always under pressure and it always moves. But irrespective of that, we have . . . and the wreckage of the state of Louisiana established that there is — we know of this particular instance where 48 million cubic feet a day is coming from Texas, is exempt from this tax because it has paid it's Texas severence tax, it moves into . . . pipeline and moves into Louisiana and is processed in Louisiana. So, you can not tax this gas that you trying to tax and not tax the gas that comes from Texas and is processed in Louisiana. There is lots of gas that meets all of the other minimal requirements, and when I say meets it has the same connection with Louisiana as the other minimal requirements, but, there is this 48 million cubic feet of gas that is processed in Louisiana. All of it moves through the pipeline. Much of it is sold here. Much of it is transported to processing stations. Much of it is measured here. All of these are also items that are subject to tax, and when you talk about that the Supreme Court has also said that there may not be any repeated exactions, meaning you can't have a situation where one state can tax a product and that same tax be levied by every other state through which it passes. And if passing through a piepline — . . or selling it or transporting it to a — one of these plants constitutes — one of these factors, then there could be repeated exactions all the way from Louisiana to Maine. That is another reason why this tax is unconstitutional. The four rules as far as . . . is concerned, I think that the activities are minimal. As far as a fair relation to benefits is concerned, it's certainly discriminatory because the benefits that are given to this tax — to this gas are identical to the benefits that Louisiana gives to it's own production, to the production that moves through the states, and particularly to this 28 million cubic feet of gas that comes from Texas, and is processed in Louisiana. So,

we are violating every rule that the United States Supreme Court has laid down. Now that's the fair benefits, and what are you talking about the benefits. You are charging these people seven cents which is identical to the severance tax and you charge nothing to Louisianians for their movement of their gas, and the processing of their gas. You charge nothing to the Texans for the movement of their gas, and the processing of their gas, and you are charging the same amount on this gas as you charge for the wrenching it from the soil of Louisiana, an unrecoverable, non-renewable resource. This is not a fair distribution — to charge seven cents for a severance and also charge seven cents for moving it through a pipeline that already pays it tax or running it through a processing plant that already pays an advalorem tax. Now, then you come to the question of discrimination. There are all kinds of discrimination . . . . In the Boston stock exchange case, which was decided fairly recently, the United States Supreme Court says it is not only a question of an existing discrimination, but if it is susceptible of discrimination in the future, it is unconstitutional. This is a tax on gas — is discriminatory in the sense it is not applied to oil through the mention made of the ecology, the reference to gas and oil are . . . as far as college is concerned, and no matter what this tax is called it ends up being a severance tax. In this auto transit case, just as Blackman said, that you no longer determine a tax based upon what you call it. You determine the constitutionality of a tax based upon what it accomplishes, and what this tax accomplishes is the tax to place a severance tax on off-shore oil with the hope that it can be exported to other states. In addition, as a discriminatory fact, this tax is not levied on the owners. The owners of the tax are not the people who do the processing. The owners of the tax are the pipelines, and we will come back to that later. So, you levying a seven cent tax on people who don't even own the tax of the gas. Then we come to the question of uses. There is no apportion. There is absolutely no apportionment, which is one of the requirements, because none of this tax is going to be levied on other products of the same character, and whenever you

have a use tax, you have to levy it on everything of that character. You can't say you are apportioning it — you are placing a tax on products that come from Texas into Louisiana. The reason for the use tax was the Supreme Court recognized that some states had sales tax and other states did not. The people in the states that had no sales taxes went over the border, bought their machines and bought their products, brought them into Louisiana, used them there — here. To equalize that they permitted Louisiana and the other states to have no sales taxes to equalize with a use tax. To equalize with their use taxes the use of the products in Louisiana when they were brought in from out of the state and used in Louisiana and the court has said if it doesn't end up with a use, with a consumption, not a use as to find in this tax, buy a consumption in the manufacturing process or a use such as the use of machinery. It can not be equated with a sales tax and only interstate commerce that ends up with such consumption substantial use can be taxed, not these minimal . . . uses we are talking about and not the processes. The case called . . . and in that case the court said that there had to be equal treatment on products from outside of the state. I'm going to touch just briefly on the . . . clause . . . The United States has adopted the natural gas act and OCS Act where and FDA controls completely without any qualifications, and has a right to fix prices and when you ask whether or not these bureaucratic bodies will amend this to be passed through, you can only say that you have to look at it historically to see what someone is going to do. They have the power to pass it through or not to pass it through. But historically, this bureaucracy has permitted the . . . of 14 dollars a barrel the oil that is imported from outside of the country and 5 dollars on our home produced oil, and make us sell our gas to 20% of it's BTU value and how can you expect them to look kindly on the prospect of increasing another seven cents on the consumers that have such a political clout in the northeast. I say, it is just unrealistic to assume that will happen. I want to also talk a bit about the contract clause. We had a great deal of discussion this

morning on the question of the sanctity of the contract and whether or not that can be composed on the reimbursement division that's in this proposed sanction. The reimbursement clause would benefit excellent if it was held to be constitutional. In arguing that it is unconstitutional. I am arguing against Exxon interest in this particular speech, but it is the constitutionality of this particular section of the constitution, and of the new process clause which has made free enterprise work. It's the reason that the United States and Louisiana are great, because industry can depend upon not having the agreements that it makes set aside. These two clause, and particularly the impairment of contract clause have been almost invariably maintained to an extent beyond the erosion that it happened in many other sections of the Constitution. The court has permitted a state to exercise it's police powers for the welfare of the — the public welfare, the morals, the health and the lives of the people. In the 1933 depression, they extended the rule to say that that was such a terrific upheaval that they could be a moratorium on the foreclosures of mortgages. Subsequently, there have been a few situations such as that where the court has permitted it to hang — to be advocated. But, the language in the cases unquestionably says that the contract may not be impaired. Chief Justice Marshall, a hundred and fifty years ago said that impairment means no abrogation, no change in the rights, and if it releases a part of the obligation, it the past and in the United States Supreme Court just a few years ago in the Bank of . . . against . . . he said a contract is not to be impaired at all, it's not a question of a degree, but a disclosing of any part of it is fatal. So, what we are being told is that where there is a peripheral provision in a contract, it can be changed. That is not what the United States Supreme Court has said. There are a number of cases, one of them that started it was many years ago in the United States Supreme Court where they held . . . an oil lease provided that the lessee was there all the time, that the state could not come along at all. They could not come along and require the lessor to one-eighth of it because he was getting one-

eighth of the royal, and since that procedure there are any number of cases which would tell the same thing. All the way through they have said this can not be changed and the courts continued to say that that facet which is certainly only a part of a . . . can not be changed. The courts say that you can not reduce the amount of an indebtedness and you can not accept in cases of great upheaval such as the depression make an extention of time in which to pay that and the courts have also said that wherever you do it, it has to be for the benefit of all of the citizens. It can not be just a private contract that you are changing, it can not be a series of one class over another class. It has to be state-wide and every contract containing that sort of a provision has to be affected by the same statute, so that you can't just say that in these particular contracts of reimbursement on off-shore gas that it doesn't apply. And then what do you do when you have the provision like that in the processing of Louisiana gas. You don't apply to that. What do you do when you have the provision for the same situation with gas moving in from Texas or other states. You don't apply it to that. So, there's gross discrimination. It just can not be done because you can not discriminate in the application under any circumstances. The courts who said this can not be . . . now certainly if you change the rules as to who has to pay a hundred and seventy million dollars it is not minimal, it's not peripheral, and it's certainly is depressive — depressive on somebody — however owes the debt, and the state cannot change the rules as between parties on private contracts as to who can pay this debt. There are some who say that the Louisiana Public Service Commission has changed contracts with respect to gas being furnished to power plants, but that is under a constitutional provision which gives public service commission the right to make these regulations and they have always had a right to regulate the operation of the utilities and their rates and their charges and everything that relates to them, and the constitutional question as to the invalidity of a contract has not been raised because of that factor. The — in the 1977 case, the last case on the subject, the

Supreme Court said private contracts cannot be modified to repudiate debts or deny the means to enforce it. I also want to point out that there is a very good argument that could make — and I don't want to take up the committee's time — that this particular phase of it, this reimbursement clause is a denial of — and is a denial of the equal protection. Thank you gentlemen.

(Mr. Leach) Thank you, Mr. Woodward. I think that you certainly have made available your opinions on the constitutional question and the committee appreciates that. It's one of the sad things in the state government that we still attempt to consider bills of this nature within a given limited amount of time. At this time, ten minutes after one, I am going to call a recess for the committee. We will come back in at two o'clock. If you all will please be here at two promptly because we do have some additional bills that . . .

find a chair. Sergeant-at-Arms would you come up here, please. When the committee recessed for lunch, we were having a presentation from the Exxon. Mr. Woodward completed his testimony in regard to constitution questions. Now, would you like to continue sir? We would ask that if you will in . . . time, if you would make your answers an brief as possible, I know our committee members don't always ask questions that bend themselves to brief answers, but we will try to this afternoon.

(unknown) Thank you Mr. Chairman. In interest of time, I have prepared a testimony but I will dispense with that and file with record . . . testimonies . . . here. I would like to make a few points that are arguments in opposition to this. At regards, the FERC attitudes when they are approached and . . . through this tax as part of the rate pace, we think a most likely event will be that the FERC will refer the pipeline companies purchases of the gas back to the basic contractual arrangements that we have with them on these processing agreements. As mentioned earlier, the processing agreement is a . . . partial of the sales contract, and that we retain the right

to process gas . . . . down the line. In this arrangement, or this agreement, we the producer have to bury the full cost associated with this processing. This is . . . dual processing cost, so we think that the most likely occurance would be that FERC says that you have an agreement, . . . gas purchaser, you exercise that with the producer who is processing the gas. That being the case, and we think a most likely case, the producer has two options in which to prepare the cost of this processing, the First Use tax on processing. One is to pass this through to the consumer or purchaser of these LPD products, ethane, propane, butane, etc. This is not going to be easy, in fact we don't see this as a real . . . for two reasons. One, propane and butane are under federal price controls, therefore, the amount of increase that could be passed through is going to be limited. The other, ethane, is not under price control, but is controlled by market demand. In essence, propane and butane are controlled to a large extent by market demand. But, the recovery of cost of this First Use Tax under the sales . . . that are recovered, we would have to increase the price of these products five to six cents per gallon to the consumer to the petrochemical industry and to the consumer in the rural area that . . . on propane as a prime source of fuel and heat. Being not able to pass through the . . . of five to six cents per gallon on the cost of these products because of market demand and federal price control we have to look at the other option we have, that is the economic will continue to process it. If the plants that we operate have to operate or have a control . . . interest in, there are nine of these plants that process OCS gas. To the full cost of this seven cent . . . seven of the nine plants become uneconomical at the time this bill becomes law. This means, that being unable to recover the cost of these First Use Tax products, then we have to look at . . . down at the operations of these processing plants as soon as possible of the economic. Therefore, in some . . . terms, Exxon strongly opposes this proposed legislation. We think it is unconstitutional, the tax we think will fall largely on Louisiana consumers and OCS gas producers under vitals

in the quarter complete. We strongly object to violation of contract and do not desire this strife and litigation that this legislation will encourage. We think the implications for the state of Louisiana are very serious if the bill passes and we urge the committee report the First Use Tax proposal unfavorable. Thank you.

(Mr. Leach) I would like to ask one question on the point about the processing plants. Now I understand that Exxon has nine such plants or there are a total of nine such plants in Louisiana processing gas.

(unknown) We have — interest in or operate nine plants that process OCS gas along with some gas. We have other plants, but these are the ones that are processing OCS gas which would be effected by this legislation.

(Mr. Leach) What percent of the total production in Louisiana of the methane/ethane/butane/propane of these — these nine plants contribute.

(unknown) Let me refer that question to Mr. Godbold, who is more familiar with the . . .

(Mr. Godbold) I don't have the exact answer for you — about the — about half of it. In answer to one of your other questions, I counted about twenty three plants in total in the state that process OCS gas. . . .

(Mr. Leach) A total of twenty three such plants in the state?

(Mr. Godbold) Yes.

(Mr. Leach) Mr. Champagne.

(Mr. Champagne) Yes, I want to ask a couple of questions. You figuring that this five to six cents a gallon would be contributing to that proportion that is extracted, not that portion that goes out of state or only that which it can extracting from the gas at that point or is that the whole hundred and forty million?

(unknown) That is the cost that would have to be imposed on the products that recover and the plant processing. We're saying that the liquids will have to bear the cost of the First Use Tax.

(Mr. Champagne) OK, you're saying that in other words, that no chance to pass on the cost of the natural gas.

(unknown) That is correct. We . . .

(Mr. Champagne) Alright, the next point is . . . I just want to point out one thing. You agree that there is a problem about the cost of imported oil and American oil. You think there is a problem.

(unknown) Yes, there is a problem.

(Mr. Champagne) I just want to point out to you that I feel that this committee and the members of the legislature have doubts to positively about the unconstitutionality of the act. I feel that way — it has slight doubts, reasonable doubts, no question at all. We also have in public said that it is not fair for the coal people to impose taxes and we don't get anything in return. You put where we must try this or else and we pay for the responsibility that saying that you were not able, you were not willing to try to impose this upon other people. You see what I am trying to say, sir?

(unknown) Yes, I understand. I understand the frustration that we all have about this regard.

(Mr. Champagne) Yes, so they feel the same way you feel, and I feel about the fact that we have two levels of prices of oil. Being with Exxon, I'm sure you can understand that, and you know the people have the same feelings about the fact that we are paying the price for coal added on to us and here we are sending this gas in many cases out of the state and not getting anything for the people here.

(unknown) Yes sir, I think that this points up the efforts of all of us need to make both the citizens and as the state

of Louisiana to work towards a comprehensive energy policy for the U.S.A.

(Mr. Champagne) Yes, of course I'm sure that you are aware that we are too — that we have a small voice in that. Now, let me ask you this question. Do you feel that it would — I know it is not something you would like — but do you feel that it would imply an undue hardship say if this tax went into effect, that you would have to put it in escrow or something and carry it through the and if for chance the thing did possibly get by, but I don't think that it will, but it did — do you think that that would give some belief to the people of Louisiana?

(unknown) I'm not sure that I'm following you question. In regards to the litigation, we see this as being three to five years in duration and requiring a tremendous amount of the resources both financial and manpower to reach a conclusion. We see that money — the moneys that are paid in as first use tax and held in escrow, which is going to be an effect on our cash flow as far as corporations.

(Mr. Champagne) Yes, and let me ask you one more question. Do you see the possibility that if this legislature or following legislature are to get to raise money, that the first place they will look are people like Exxon and oil industry.

(unknown) We get that feeling.

(Mr. Champagne) Well, what I'm saying — you understand that you have this to face or . . . and that's all I'm trying to point out.

(unknown) Yes sir.

(Mr. Leach) Alright, I believe Mr. Bel if you would — we need to try to wrap up this . . .

(Mr. Bel) In your statement, you said that you believe that the bulk of the tax will be paid by the Louisiana consumer. Would you kind of describe that consumer.

(unknown) Yes sir, that's both private and industrial. The ethane that is produced in the state will remain in the

state . . . about twenty-five percent or so of the propane that's extracted from the of the state for commercial, residential, and industrial use. So, in effect, the cost associated with the — will have to pass through this First Use Tax and end up on . . . this is going to impact on the consumer here in Louisiana.

(Mr. Bel) But when you are talking about the three hundred million people in the state, how many of these people would be paying the tax?

(unknown) I don't have any work out . . . I do think that we should . . . in the petrochemical and industrial sector that may be calculated through our using the Louisiana supply at this point. We would have to look outside the state of Louisiana for a supply of LPD . . . which could effect future plant locations. If you know the petrochemical industry has moved into Louisiana and Texas close to the source build the plant. With the Louisiana producing about 25% of the ethane in the country — Texas producing about 60%, there is a greater supply in Texas today than there is in Louisiana. We think there would be in effect as far as the industrial development to . . . this exercise goes to litigation . . . 5 years — there is going to be a tremendous amount of uncertainty as far as future unit investments here in regard to chemical plants or manufacturing plants.

(Mr. Bel) The only point I was trying to make was that when we talk about consumers this day and age we tend to think about the housewife in the grocery store, and I don't think that they would be affected by this tax.

(unknown) Some may not be directly, and — in some instances I think we have to look beyond perhaps there is some indirect. I can't answer your question on this.

(Mr. Leach) Thank you sir. No other questions? Thank you gentlemen, we appreciate you being here. Mr. Ed Steimel with LABI I believe he had time to come back.

(Mr. Steimel) Thank you sir. I appreciate . . . I appeared this morning or this . . . one thing you did was to benefit a group of people about the effort. . .

(Mr. Leach) We expect to hear from them later — right.

(Mr. Steimel) One point that was made this morning that I would like to clear. It might have been a slip of the tongue. He did make a statement that this bill might and I have to quote avoid the rate in property taxes . . . I think all of you know that we don't have a . . . . property tax and there is no way that property taxes could be raised to pay any state debt. It is — you pay local debts, but no state debt. I feel a little bit intimidated at being — at following that line of attorneys, law school professors, . . . I remind those of you who didn't live through the 1960-61 period, that many of these same people wrote the laws that are enacted in the five special sessions that sought to overturn the United States Supreme Court's order of desegregation, and which were overturned themselves. . . . and the attorney general's office did the same in 1975. They sought to break the law in the constitution that demands that . . . money be used to pay state debt. I suggest that perhaps you will need a new line of . . . . Billy asked me to appear on his behalf here today, and I told him I would lead off with a statement to this effect. I am going to say that I see equity in a tax of seven cents a thousand cubic feet . . . offshore just as seven cents is levied on the shore gas. I see equity also on passing that tax on to all consumers alike just as all taxes are ultimately if the purpose there is a clear need for the tax so his stated objectives of the bill are not the basis of my concern. In this bill and the other three bills did that and only that I wouldn't here, but that is not what they do, that is what they are reported to do. Just as all of us want to go to heaven, not one of us would enjoy the process by which we get there. All of us perhaps can agree with the objectives of this thing, but not with the process by which we get there. And, I want to talk about the process, just a little bit. No tax should be passed unless there is a clear need for it and no apparent alternative because all taxes

become a burden on the economic system and weaken it unless they can not be avoided. To me, that is just a philosophical position that we can take. The consumers the first use tax, the corporate income tax, the severance tax, all taxes. So, why have this to the consumer. OK, let's look at that great and need. What is it? To repeal and retire debt and a little bit protection-25%. That's hogwash. It's a rare politician who sees debt as worthy of his concern. Why? Because the debt is usually of somebody elses doing. Why should you be concerned about somebody elses debt? Now, I'm not speaking any abstract. Let's look at a little bit of history. History that our attorney-general is involved in. In 1962 many of us supported and got place in the constitution and provision dedicating all of the revenue to the retirement of state debt. Period. Along came the first settlemen of a hundred and thirty six million in 1975. Who was here then — many of you, and the governor, and the attorney-general tried to move heaven and hell to avoid spending any of that money for the purpose as demanded the Constitution. And you say, we'll do it by a Statute . . . They have to be taken libertly . . . we want to violate the Constitution to be forced to use it to use debt. They wanted to do what any red-blooded politician wants to do — built buildings and roads that might bear their name. — so don't tell me the purpose of this tax — it is a because — it won't last past the first session after the '79 election. It will take the next governor ten days to get fifty-three votes in the House and twenty in the Senate and sign the law — a whole new use for the hundred and seventy million. Mr. Alario, you were absolutely right — you can't buy the next legislator's two-thirds vote with a fifty-three votes. There is no way. He'll want to build buildings with his name on it and many of you will help him repeal that dedication. Another concern I would have if I were you is that this is a tax. A tax. I want to say it once more — a tax. Only people pay taxes, and only people vote against legislators who vote for taxes. Why would you vote for a tax when everyone up there and back here agree that this tax won't produce one

red cent during the tenure of most of you people in this legislature. Won't produce one cent. It will be in the courts and you can't spend it. So, what you are really doing is passing is a tax that your successor can spend for purposes the opposite you chose yourself on and give your vote in passing it to defeat you. I suppose next election or the next one. You are passing a tax for your successors to play with. Many of you already have a couple of tax votes to your credit or to your debit and many voters will be told that they were not needed. We would like you, and please don't make it impossible for us to help get back here next year. Another concern that we have with this whole idea of tax credit — we've had a little experience. You all had a little experience last year, didn't you, with tax credits. Remember the national gas tax credit. It was enacted in 1973. It was repealed in 1977, a prior national gas tax credit was also repealed in 1972. They don't last long. What happens to tax credits is that they become a subside after four years. The difference between tax credit and a subside to industry in four years. Now, without the tax credit, which nobody in New Orleans is . . ., even the dumbest oil company would oppose to First Use Tax. What amazes me is the naive of some who seem to believe that this tax credit for the first use tax will provide. We'll forget this tax. Hope you have it recorded because we tried to play it back last year, but we couldn't find the recording. What happened back in '73. There are many reasons why this tax credit won't survive. Now . . . is that this legislature is perhaps two or three or four year will repeal it. That is or secondly, it will be held unconstitutional. The tax credit also will exceed the severance taxes paid by many companies whom as a separate tax is defined as they are and as offshore production increases as they are. And the differences have to fall on the Louisiana consumer. And this will be more and more each year as the off-shore production exceeds the on-shore production. Now, the greatest impact will be on the Louisiana . . . because the impact will be felt on the petrochemical industry and on the rural . The . . . the petrochemical industry, . . . primarily, will be

priced far above present level so it will make it less desirable to expand in Louisiana. So again, Texas gains at our expense. . . . to why. Think of the injuries to the construction industry when the petrochemical industry decides to tread water or maybe with all the uncertainty why not fill that Ethyl plant in Houston where they have a big plant instead of in Baton Rouge where we don't know what the situation is here. Remember, that sixty percent of all industrial construction is in the petrochemical industry, and that is year after year. Last year it was exact one point four billion dollars of the two point three was petrochemical. You can take it for the past ten years and you will find the same thing. This is the industry on whom we are the uncertainty. If I were the construction industry I would be up here worrying about this. How much do you really want a cash debt on that number one building and producer and producer of the construction job in Louisiana? Finally, are you really ready to say that you want to use the law to break contracts? This is my greatest concern about this piece of legislation — to break contracts between two knowing parts. Louisiana continue to brush away the bad ends that it doesn't really deserve any longer if you break these contracts and bring that back are you really ready to use the law to valid contract, if it were nothing on this bill that ought to be enough for any man with integrity to vote against this bill. None of us believe the court will uphold this but why would you want your name on such a damageable item. Yet, it were not in the proposal it simply couldn't be pieced together. It's all tied up in there. I ask them to remove. That. They can't. We can't support . We can't support violation of the sanctity of the contract. Of course, we all get lawyers on both sides of this thing, and that's what lawyers are for, to be on both sides. This is a lawyer's bill. Brother, will it put them to work. This probably would retire many of them. The author simply has to assume and assume and assume and dream and dream and hope that all of us will his fantasy of purpose, his fantasy of technique, his fantasy of a free

right for everyone in Louisiana. All be it we do agree with his objections, what we have here is the of the first . It reminds me of Fantasy Island, a popular TV show, where all your dreams come true. But, Fantasy Island let me remind you ends every episode when the dreamer transports back to reality. So, let's run through that. The dream here is that the tax will be passed on to the eastern consumers by placing the tax on transportation and a series of other activities. In tax, it will fall down in the process. But we don't want that because that means it falls on Louisiana people. And, this bill wants to hit only the easterners. That's what we are told. So, we just the contract written in the pipeline and the processors. They won't get anyone. Breaking contracts is really only a sin in the real life. It's not a sin on Fantasy Island. Processors, of course, of this bill to themselves Argue in favor of abrogation in court knowing they are going to lose. And they will. Then the great good government says sorry fellows we tried. Yes, you'll have to pay it. They are not going to say, sorry fellows we tried, we are going to repeal the bill, yes, you will have to pay it, until Fantasy Island is over. Reality returns. Of course, what does it really matter? It just the oil company. They can pass it on to the where the petrochemical company who may ease up on their expansion here because ethane, propane, and butane are cheaper in Texas, and those that do continue to operate here will have to pass on the tax even if it means tightening her belt and laying off a few thousand people. In the end even the First Use Tax will get plain ordinary people all taxes, due, and the little people get hit the hardest, and that's what the people will use in opposing anyone who runs for reelection who has voted for one, two, or maybe three or four taxes to retire debts. That is a really poor . Louisiana people may have believed that kind of thing once, but they are a little brighter than that now, and there are more people around now, who can help them with their if they forget. Thank you.

(Mr. Leach) Any questions of Mr. Steimel. Thank you Mr. Steimel. Mr. McVea Oliver wants to make a statement only. Mr. Oliver.

(Mr. Steimel) Yes, your honor, The people I represent are Transco . . . and United Gas. They want me . . .

(Mr. Leach) I'm sorry McVea. I want you to come forward so you will be on tape, please. If you would, as fast as possible.

(Mr. Steimel) I'm McVea Oliver, attorney in private practice in Monroe. I'm representing Trunkline Gas Co., Transcontinental Gas Pipe Line Corp., and United Gas Pipeline Co. These corporations have authorized me to say that they are opposed to the tax, that concerned about the

(Mr. Gibson) Mr. Chairman and gentlemen my name is George Gibson and I'm an attorney for Amoco Production Company. I appeared here today to briefly speak to you on the viewpoint of the producer and as this measure might affect that producers and I also want to speak to you as a citizen of this state and its nation. Most of the points that perhaps I would like to make as if we were in court or a higher court have been made and made very easily by people appearing before me. I simply want to repeat those things and I want to tell you that I really don't have any answers. I do have some questions and I do have some fears that I want to tell you about and some questions that I want to present to you. I might say at the outset that the author, primary author Representative Tauzin has given to those of us interested in this matter every opportunity to make recommendations and suggestions and he has accepted many of these higher powers. Our fundamental suggestions that he withdraw the matter from the files of the House he so variable rejected repeatedly.

I would like to say this Mr. Chairman and Gentlemen, from our viewpoint we fear the failure of tax credit procedures that are contained in House Bill 1187. We feel the failure of the past forward procedures that are in this

measure before you now is House Bill 768. We fear that the economical burden with this tax will rest on the producer by failure of this Section 1303C in House Bill 768. Notwithstanding the assurance of Representative Tauzin and Professor Bacon, I had the honor of being a student of Professor Bacon and still have the honor of being his friend and still being a student under him. But notwithstanding this assurance we fear this matter is a failure. We also fear gentlemen that the proponents of this measure who have given us these assurances, Billy Tauzin, Gov. Edwards, we fear that down the line when we may need them in the event things do go wrong not as anticipated by them but when we do need them for help and relief that they may not be here. Billy is young, dynamic and I'm told ambitious and he may go on to bigger and better things. Certainly the government would go on to better and bigger things or maybe they will all retire to a comfortable practice. At any rate we fear that our friends who give us these assurances today sincerely given to us will not be here when we need their help. I know that there have been a lot of changes brought about by a series of supreme court decisions and I won't go into that while I accept the fact that there is encouragement for those that believe it may be this type of answer withstanding the constitutional tactics. I will not go into that at all but just to simply say I recognize and appreciate the ordinances that are being made. But now a few questions, you well know from what you have said and the questions you have asked here today, you well know that this is not simply just another plain tax issue. This is a philosophical struggle you might say. I would suggest that perhaps a law review article would be appropriate, it could be termed exportation for taxation a new era by Billy Tauzin. Gentlemen, seriously even if this exportation taxation is accomplished we ask you this, is it wise? Does this tax not invite retaliatory action by other states? Does this movement not actually encourage adverse response from the federal authorities. No one has noted here today but I must do so now that this state has been receiving

funds from the off shore area under the coastal zone program from the federal authorities. Would this type of thing make it more difficult to accomplish the work that secretary Fischer of the department of transportation and development has been able to accomplish. Gentlemen would not this kind of action tend to vulcanize our country. Are we not in fact one nation, I know that the proponents are sincere and the intentions are fully harmless, but I ask is it wise why for us to take this action to strike back at the citizens of other states. Certainly this is going to polarize our antagonistic positions. Would it not be better gentlemen to use the better points of our elected leaders employ logic and reason to reach these people who have not treated us fairly to help develop a sound national energy policy to really promote harmony among the states and the people of this nation. And I don't know for sure because I'm from here and have always lived here, but I honestly don't believe gentlemen the people in the north oppose the state of Louisiana or the people of Louisiana or oil and gas industry from this point forward out of meanness. I think they do it out of fear and out of ignorance. They fear something dangerous and ugly might be put down next to them. They've been mislead by self-seeking political figures perhaps by self-appointed experts who oppose progress in any form. I honestly believe gentlemen that the taxpayers of this nation and each and every one of us is part of that group we are one body and is it not a fact that any tax levied by any level of government at any place upon any taxpayer in the final analysis affects each and every one of us. Should the tax leveer considering this type of philosophical exercise great restraint I will not presume to tell you what to do but maybe I can presume to suggest two things. Do this thing, prove this measure only if you are fairly satisfied that it is good and right and proper don't do it out of a feeling of retailation or meanness or for bitterness or cynicisum, don't do it simply because you can do it do it only until you are satisfied with what is right. Thank you very much.

(Mr. Leach) Mr. Chairman I know that I was late and I just want to make a very brief statement on behalf of Shell to concur in the concerns that have been expressed here this morning by Mr. Brooksher of . . . Association the Exxon representative and the comments made by Mr. Gibson, I want to say that the outset on behalf of Shell that we acknowledge Representative Tauzin's efforts in working with industry in recent months to try to remove as many of the fears that we have as possible. We understand that this bill is designed primarily to protect Louisiana producer and we appreciate Billy's efforts in that remark. But I must say to you, quite frankly Mr. Chairman, that there are concerns in this bill that we don't believe in and this legislature can fully correct. First of all there are basic constitutional questions involved concerning the First Use Tax concept itself. But so far as we are concerned the primary exposure to us and its tax paying citizens and producers in Louisiana is the abridgement of contract provision in the act. We see this First Use Tax being upheld if it is held at all on the processing of gas. Assuming that to occur and assuming that the abridgement or abrogation of contract language in the bill is stripped on constitutional grounds. We see no way that this tax can avoid coming back on us as producers, and even omiting the question as to whether or not the tax credit will be pertaining to our further legislature, we are faced with a situation whereas our state-serverance tax liability decreases in further years we have deminished basis against which this will be offsetting. Based upon these concerns we do have to state this morning that we believe this is a bill that will ultimately impact in a very effortless way Louisiana producers. Thank you.

(Mr. Rutrough) Thank you Mr. Chairman and members of the committee I just want to go on record as saying that Tenneco representing Tenneco Oil and Tennessee Gas Pipelines as opposed to the bill, I think we stand to get hurt as much as anyone to the tune of 51 million a year so we have a very great concern on this and we just want to go on record as opposing.

I assume that we have heard from those who have filed an interest card early this morning. Did I miss anyone who had indicated an interest to speak either in favor or is Mr. Jimmy Morrison in the room at this time. Jimmy has indicated that it is his desire to speak in favor of this representing Louisiana Association of Educators. Mr. Tauzin if you will we will pass this.

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

I, Jerry J. Guillot, Director of Committee Staff Services and Custodian of Committee Records, do hereby certify that on this day, September 8, 1980, that the foregoing is a true and correct copy of the transcription of a tape recording made at the June 6, 1978 Meeting of the House Committee on Ways and Means concerning House Bill No. 768 of the 1978 Regular Session of the Louisiana Legislature, and that the tape used for transcription was a tape used to record said meeting and that said tape has been in the constant possession of my office with the staff of the House Committee on Ways and Means.

JERRY J. GUILLOT, Director
Committee Staff Services
Louisiana Legislative Council

Hearings on H.B. 768

Before the Senate Committee on Revenue and Fiscal Affairs

(Hearing of June 26, 1978)

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(Mr. Tauzin) Gentlemen and members of the committee, what you have today is a package of three bills which includes House Bill No. 140 which is a constitutional dedication of funds from the first use tax. House Bill 767, which is a statutory implementation, parallels the constitutional dedication and goes a bit further in implementing the provision of the constitutional amendment. And House Bill 768 which is the actual first use tax itself. Before detailing these bills for you, the Governor has requested his right to speak to you for just a minute on the general concepts and his support of the constitutional amendment itself.

(Governor) Thank you Mr. Chairman. The unexpected interruption of his recorder and the sound it brought to this room cause me to suggest to the members of this committee that we might all strain our natural ears to try to discern a sound or rather three different sounds that are bouncing against the ozone even as we talk today. Two are man made. One comes from the action of nature. That first blush one would think they are totally unrelated, but they vary very important relationships to the state's economy in our future. They are first, if you will lend your ears for the effort to the humming sound of computers in the financial centers of the world ticking away the interest that is on our state's obligation and second the hissing sound of natural gas passing through pipelines as it reaches the southern border of the state and is processed and then goes on to other parts of the country. And third the kissing sound of the Gulf of Mexico as it waves lap the borders, to erode the Barrier Islands and shorelines. Humming, hissing, kissing all out there but having a definite relationship to the bills we have today. A definite relationship because we want to try to interdict the hissing sound of the gas and to capture some fruits and revenues for the state to toll the humming sound of the computers as it calculates the interest rate. And then to stop the erosion of our Barrier Island and the coastal area of the state of Louisiana. So important to the state and its future is this legislation, Mr. Chairman, that I have

retreated from a strong entrench position that I have had since 1974 in opposition to any constitutional amendment. Because the constitutional amendment which will be before you today would put into our constitution a commitment by the people of the state to use the funds generated by this legislation. The first 25% of it you will prevent the erosion of the Barrier Islands and the coastal areas of Louisiana. Because by doing that not only do we help save our natural environment, but we also guard against the take over by the federal authorities of increased areas of our land area. It is estimated that 16 acres a day of soil falls into the Gulf of Mexico, which I think in a quick analysis translates to 5,000 acres per year which, even at the minimum price of $1,000 per rate, translates to over $5,000,000 per year lost to the Gulf of Mexico. Because as the coast erodes its ambulatory nature is such that the coast line of the state also changes under U.S. Supreme Court decisions and as we lose an acre of coast lien, the federal government gains an acre of water ways south of that area. Therefore, it is indeed very proper that we use a portion of the fun generated by the production of natural gas in the Gulf of Mexico from federal waters for the purpose of saving the coast line from further erosion. Second, 75% of the money will then be dedicated to a sinking fund which will be used to retire the state's debt. We were careful, Mr. Chairman, to place in the constitutional amendment a prohibition against the use of the funds to retire current state debt so that future legislators could not substitute monies generated from this fund for the general obligation of the state to pay state's debt on a regular basis. The importance of that being that it is to ultimately look to the day of the liquidation of the state's debt, hopefully, to at some time in the future in which we all be alive to be able to say that we participated in a bold venture in 1978 to make it possible for Louisiana to be the first and probably the only state without any appreciable state debt in a period of a decade. Additionally, there will be arguments made, and I close on this notice, to the constitutionality of this entire package. May I say first that no one and I repeat and emphasize no one

can tell you whether the legislation is constitutional or is not constitutional. The state of the art is such, the uncertainties of constitutional questions, the change of attitudes on the part of the U.S. Supreme Court are such that no one can really guess with any degree of knowledge as to what attitude the Supreme Court would have when this legislation is ultimately considered by the U.S. Supreme Court. Scholars of equal authority, equal discipline, equal concern, disagree at 180° turns on the question of constitutionality. I am personally convinced that because of the trend of recent decisions and the way the legislation is written, that in spite of a serious constitutional attractive, it will be ultimately be held constitutional, if in fact that is correct, so be it fine, wonderful. If not at least we will get from the Supreme Court in the process, guidelines that we or some future legislature may be able to use to try to again tackle this problem to benefit people in Louisiana. I hope, Mr. Chairman, that this committee will pass out this legislation, that it can be considered by the senate. I want to say also that this past Friday night I was in Houston, Texas for President Carter's visit there and not less than eleven legislators and state officials and people in the political arena in Texas came to me and chatted briefly or lengthly about this legislation and commented about its boldness, the innovativeness of it and the fact that they were waiting anxiously to see what the outcome would be, apparently interested in knowing whether or not Texas as a state and also as a gulf producing state might be able to benefit from our leadership in this particular area. Not one of these officials suggested to me that we were approaching this problem erroneously, that we were making an error. All of them left me with the distinct impression that they concurred in the legislation and were anxious for us to succeed so that Texas could follow suit.

(Mr. Tauzin) Mr. Chairman, following through on the Governor's comments, I think it is important that you also know we are receiving a request from the states along the eastern sea board for similar information. New Jersey,

Connecticut and Puerto Rico have recently contacted us in reference to the legislation. There is, we believe, a growing trend in the nation among those states that will be energy producers to look at this as a means of compensating the various states for taking a risk and suffering the impact of producing energy for the rest of the nation. The Congress, and I want to start out by telling you, in the energy impact act presently before them sponsored by the Carter Administration actually conceives of this, a user tax on energy produced in the state as one of the several taxes, including severance taxes, that the tax should use to match federal funds which will be forthcoming to provide energy assistance impact to those states. But even the federal government is beginning to come around to the notion that this is indeed a right and just cause as we embark upon today. The particulars of the bill before you

(Senator Eagan) Just a minute. You have finished with your overall comment on the package?

(Mr. Tauzin) Yes sir, except to say one other thing that is probably pertinent right now. What you will hear today is primarily I think in opposition is philosophical arguments and constitutional arguments. I want to say for the entire package presented to you today, it has been amended as far as we can practically go to guarantee against any impact upon producers and processors and people in this state who would otherwise possibly feel some impact from the imposition of the tax. In order for you to better understand what we have done, let me illustrate by way of chart example. What happens in this state in regard to the resource we are talking about and we are talking about a limited resource. We are talking about natural gas brought into this state from outside our boundaries that is not taxed by some other jurisdiction. At the present time that practically means OCS federal gas. That gas is produced outside our three mile limit in the federal waters. It is piped in to processing companies in Louisiana and then the dry gas is shipped out of state. Approximately 5% of the product is removed in the processing stage as liquid — propane, butane, methanes

and what have you. Additionally, you need to know that that particular amount, the 5% is exempted in the bill. Now what we are talking about is the tax against the pipeline companies who own the gas and who own 95% of the product which is a measure of the tax. The tax is on the activity that occurs in Louisiana. The transportation, handling, the processing of the gas in Louisiana as taxes against the owner measured against the stream of his product which is 95%. In about 15% of the cases the producer is still the owner at the processing stage. In that event, in those cases there is a separate bill which Representative LaBorde is author which will grant to those producers a tax credit against the severance taxes for any amount of this tax they could not pass on to the pipeline company. So the end result with the LaBorde bill in context. that we have is a tax that is going to fall primarily on the owners of the pipeline company. And it is important to know that 98 and a half per cent of that product upon which we measure the tax is shipped out of state. Only about 1 and a half per cent of the product remains as dry gas remains in Louisiana. There is a separate bill also authored by Mr. Bagert that deals with the impact of that one and a half per cent. Now what you are going to hear today also from the opponent, is there concern that some how the pipeline company may not be able to pass a tax to their consumers out of state. Gentlemen, let me tell you how it works. The pipelines companies under the Federal Energy Regulatory Commission (FERC) is allowed a rate base pretty much the way our Public Service Commission allows rate basis to utility companies in Louisiana. What happens when this tax goes on board, and it will begin collecting in April of 1979 which gives pipeline companies sufficient time to put the new rate base into affect. The pipeline companies will then be in a position to request a new rate base from the FERC. The rate base will include any changes in their rate structure — inflation, higher cost of doing business, for labor, supplies A-J production of the volume in there lines perhaps in this particular tax and any other costs for operation they have. This rate base case then goes to

FERC. It is projected that FERC will probably withhold final decision of the rate cases presented to them by the pipeline companies until the courts have finally decided the constitutionality of the tax itself. In the meantime, what happens is after a five month period of delay of the notice period, after that six month period the pipeline companies actually begin collecting in the interim the new rate base from their customers and with the provisions that they will refund if and when the Court shall rule that the tax is not constitutional, therefore, not allowable in the rate base if that should occur. So what you have in this package of bills is in affect a set of legislation that gives us for the first time a chance to tax the activities associated with a product that is untaxed in our market place. That particular product competes in the same market place as the natural gas produced in Louisiana for which customers pay a 7 cent per MCF burden. That particular product is unburdened of such so the tax is meant to provide equity of treatment in the two products in commerce. To provide that both products will bear a 7 cent tax when there sold to customers. What you need to know secondly, if the mechanism we provided in the bill failed, if the producers here who have sold that gas at the well-head, if those producers are made to pay any part of the tax, then the tax is null and void. That is in the bill. I want you to know that in advance. It is impossible for the producers and the processors, the people who manufacture the methane, butane and propanes in this state, to suffer any financial impact of this bill. The LaBorde bill we have has an amendment that is going on that is even going to cover the cash flow problems in the interim so that companies that may feel an impact until final determination by the Supreme Court will have their cash flow problems taken care of interim credit problem from severance taxes. There are mechanisms in the bill which provide reimbursements for credits so that the state general fund is not hurt by the granting of the credits. The last thing that you need to know is that in the bill there is a clause that is essential to the whole process that provides that certain languages in some of the producers contracts. Let me describe to you

what language that is. When the producers sell their gas offshore at the well-head, they reserve the right to process it before the pipeline company takes it out of Louisiana. In that reservation they agree to pay the cost of processing. Some very few of the contracts even mention taxes. The bill we have before you provides that in knowing that shall the court interrupt that language to mean that the producer must pay this tax which is on the owner of that 95% of the product. The producers are going to claim that some of abrogation. I want to tell you that it is not abrogation under the law. The law provides in many cases where the public interest is concerned and where contracts and clauses in the contract that are not the main portion of the contract, the main portion of these contracts. The contracts with or without these bills will have full affect. The producers will pay the cost to process it. The sales will go through as scheduled under the contracts. There is no abrogation of the contract or the provisions in the contract. The provision that we have in the bill is meant simply to protect the producer against the pipeline company trying to pass the tax back upon him. So an interpretation of that language in the reservation of the right to process. So you will be hearing that and I want to brief you on it in advance.

(Mr. Barham) Billy, I think you have answered my question, but I'm not sure. I am not sure that I understand it. Let's assume the situation where the pipeline, the owner of the pipeline has made an application to the federal regulatory authority to include in his base rate this tax. And let's assume that there has been an attack on the tax by someone as far as the constitutionality of it is concerned. My first question is I believe you said that the pipeline company will be allowed to go ahead and collect this tax.

(Mr. Tauzin) A likelihood is that this

(Mr. Barham) A likelihood alright. There is no provision under the federal law for any injunction to prohibit the collection of the tax during the time all the court

proceedings are going on and during the time that the federal regulatory agency is trying to decide to whether or not include this in the base rate.

(Mr. Tauzin) There could be such a case filed. The situation is this. The pipeline companies who will require about three months to get their rate base together. Then they file it. The thirty day notice period and a five month suspension period. A suspension period was put in the law to suspend the collection of the new rate base for that five month period. It is conceivable for someone to come in and try to prevent the pass through during that five month period. Pipeline companies, however tell us and they brought to us a number of cases that they had including taxes — ad valorem taxes, the various other taxes that were passed through in their rate cases. What generally occurs is FERC says well if we can pass it through now, we are going to consider your case and examine the legitimacy of all the facts and allegations you have in your new rate base, because you see it is not going to be just this tax. There is going to be a lot of other factors involved in the new rate base such as the pipeline company doesn't have that much volume of gas. So they need higher cost per unit to cover their cost of operations. During that period of time, after FERC is going to collect it, if you are wrong, if we find you are wrong in your rate base, you will be charged with reimbursing your customers. That has been done in the past also.

(Mr. Barham) Alright, now let me ask you this. In that type situation what does the pipeline do with the money. Do they refund. When they collect it under these circumstances they've got to give it to the state.

(Mr. Tauzin) Yes sir.

(Mr. Barham) Alright what do we do with the money during this pending time. I don't think we ought to spend it.

(Mr. Tauzin) We can't. It is escrowed under the bill. The only amount that is used is that amount necessary to

refund any credits and that is done under a waiver of refund clause. If you want the credit, you have to waiver a refund. So that the total amount that we might be liable for in the event that we should lose the litigation is available for refund at 6% interest. We are likely to make more than 6% interest on it in investments. We are actually going to probably come out a little bit ahead on it.

(Mr. Eagan) So that everybody can follow, I gave you the opportunity to open but I think the proper way now is to take up one of the bills. Which one do you want to take up?

(Mr. Tauzin) The first is a constitutional amendment itself. House Bill 140 is the joint resolution to amend the state constitution. It sets out the first use tax fund which is created and established in the treasury as a special and irrevocable trust fund for the deposit of these proceeds and the interest in the profits. This trust fund is created for this particular tax bill and for any other tax bill that might follow it on the same resource. The reason that we do that is the same as the governor said that it is possible and we have got to recognize it, that the courts could rule that we have some constitutional problem with our act. In that event it is conceivable and highly likely that the legislature would then meet and cure those constitutional problems as the court defines them for us as we think they will have to. In the event, the legislature came back and reestablished it under those guidelines set up by the Supreme Court then that new tax would also be dedicated under this particular fund. So that what we are dedicating is the taxes recovered based upon that natural gas resource and the federal OCS. Now the way to distribute it in the amendment and in the act is that it goes into two funds. 75% goes for the payment of state debt and in that 75% there is first built up a 500 million dollar initial fund account and the purpose of that is to establish within the constitution and in this trust fund a large volume of money this 500 million dollars that can continue to earn interest for us. It will not be taxed itself to pay state debt. So that it will always be earning interest for us to pay state debt. That of course, is then to make sure that when

the resource actually runs out that the fund will continue working for the state. The interest on that 500 million dollars can be used to pay the state debt and any other monies accruing into that 75% account can be used to pay the state debt as the account accrues. Now the bill provides that current state debt will not be paid. This goes into the Tideland case. Remember the tidelands decision ruled that you couldn't use the tidelands money to pay the debt of that particular year. You have to pay the next year debt or the future year. The bill provides the same mechanism so that it can't be used to take care of the other state money that would be used to pay the current obligations of the state. Once that 500 million is built up, then the money continues flowing into the treasurer can use it to do just as she has in the tidelands case. To buy debt in advance of maturity where it is our advantage to do so either on the open market or through bond redemption or to pay debt in advance of maturity. The second account is the Barrier Island Trust Fund Account. The governor gave you some very kosher reasons why that account is set up. Not the least among is the fact that the fiscal integrity of the state depends upon it. You recall that the last 53 million dollar sale that we had off shore? That was right at the 3 mile limit. If we lose our Barrier Island, and many cases they are nothing but shell reefs and sandbars, if we lose those things and we are losing those things very quickly right now, the tidelands decision provides that that lines moves northward with us and as a consequence the land within that 3 mile limit are lost to the federal government as that line recedes northward. That 53 million dollar track could have been lost, could be lost if we continue to lose our Barrier Islands. I don't have to tell you the importance of them from any other respect. Hurricane protection, protection of the wetlands which are invaluable to us for the production of resources, and for the estuaraties that are contained there. But there is another good reason why we need to do this. Part of the constitutional undepending of the first use concept itself is that the introduction of this product into the state has impacted severely and continues to impact severely upon

our state. The many pipelines, the canals that are dug and Tony you know what I am talking about, you live in that area, all of that activity on our coast line and our shore line have created all sorts of lateral canals and has impacted severely upon those wet lands and many colleges believe that it has contributed to the erosion and to the decline of those wetlands that is occuring today. As a consequence one of the undependings of the first use tax is that impact is something that the state has suffered. As a consequence we have the right to ask the product of through that activity to bear some contribution to the state to compensate for that impact. Particularly in view of the fact that the product is going to other parts of the nation which have for many many years resisted producing that very same product for themselves, because they didn't want to endure those impacts. The equities are there. The constitution under pending on the impact is important to us and that is one of the other reasons for the Barrier Island Trust Fund Account. The state treasury is authorized under the amendment to invest all the monies on this deposit in accordance with law for the investment of idle funds, and to use the investment earnings of the initial proceeds account just as the other money accummulated for the payment of state debt. The bill provides, Senator Barham, that the money is escrowed. It shall not be used for the purposes ennumerated until the first use tax has been determine available through the courts. During the time of the escrow, the only money that is transferred out of that account is what ever is necessary to pay any credits that are authorized in the bill and the other bills provide that for those credits to be received they must be a waiver of refund so that the account is fully protected in that mechanism. That is the constitutional amendment. You have heard the governor's strong endorsement of it. It's the only constitutional amendment that he does endorse and he believes that it's of that importance to the state that we permanently dedicate these funds for these two very important fiscal integrity reasons.

(Senator Guarisco) I hate to speak about this particular bill, but I think most of the argument and most of the discussion is being whether or not the first use tax is a good idea and it would work and whether it is constitutional and so forth. My problem is simply should we amend the constitution for this purpose. I think that's the issue that is before us. Not how much good it will do or doesn't do. In the 1921 Constitution was supposedly an example of how not to write the constitution. We probably had the worst, if not one of the worst constitutions in the U.S. One of the reasons was that it would strip with constitutional dedications of money and tax money. It is improper to draft a constitution and is improper to lock monies into that type of document. I see no one speaking against it, and I know that I might be somewhat prejudice because I was there so I am not prejudice. I think that a lot of things are wrong with it. One is I think it is premature in that we don't have the money anyway. We don't know if we will ever get it. I feel that to amend this constitution was somewhat expedient, because maybe in order to get some votes on the House side we had to amend the constitution that we are going to dedicate it. The same people who when we wrote the constitution wrote articles and appeared and lobbied and said that we should not amend, we should take tax dedications out of the constitution and we are putting them right back in. What it's saying is that the legislature and the government in this state in the future is going to be irresponsible and I don't think that we can treat people who represent other people as children. And I'm not to say. Who knows whether we might be able to want to use some of that money to do other things. Is that totally irresponsible. I don't know. I think the style in drafting it looks like legislation. It doesn't look like constitution material. It does not conform to the style in drafting of the present constitution. I don't know if we don't get the money, Mr. Tauzin. Suppose we don't get any money whatsoever for this source. Does this constitution amendment self-destruct and not be a part of the constitution?

(Mr. Tauzin) Well, of course not. I did point out to you, Tony, however that the bill provides that not only the money raised from this tax, which you need, which may not be available to us in the long run, but we can see that. Any monies derived from that OCS resource, the federal source, would be dedicated. The reason for that is, Tony, we do expect if this legislation meets with some sort of constitution problem, the legislature will want to come back and address this problem and correct it. I think eventually, I predict eventually we are going to win this battle. In the courts the first time, or, if not in the courts, the first time in the legislature the second time around. This money is going to be ours one day down the way. The reason for the constitutional amendment is very simple. We are talking about two billion dollars or more in the next ten years. We are not talking about a tobacco tax. We are not talking about something that is so critical to this state. So important in debt retirement for debt retirement purposes. So critical in value and protection that I don't want the sponsors of the legislation from the beginning to see it go for any other purpose. I frankly am afraid. I have seen what has happened in the time that I have been a legislator even the tidelands decision. This is how we all succumb to the temptation of trying to spend some of the tidelands money for current debt operations. I was as guilty of that as you were, all of us were. I think that the temptations are from the state particularly when oil and gas is beginning to run out in this sate are going to be tremendous to tap this resource for other purposes. It will relieve the state burden in the long run. If we pay the state debt in the long run and relieve that obligation of the state operating fund to fund that debt in the long run. It's going to have that good effect on the state treasury. But if we open the door and allow future legislators the right to come in and tap it, that I'm afraid all that good intentions, purposes of today would have been lost. I'm afraid that could happen, very well would happen. I think it is so important that the governor agreed that the people in this state ought to have a right to say yes it is important enough to put in our constitution. They agree like you,

Tony, that it is not so important that they don't want to amend the constitution or have that right in November when we have a statutory dedication to follow it that will protect us and make sure that it is at least dedicated as far as we can go. But I assure you that I have been around the whole state talking about it. That's the one question that I have been asked more than any other. It's the one question that the oil people have asked in all these debates. It would not be so bad if you would guarantee us that this is really what it is going to be sued for. You have heard that over and over again. I think that the people deserve a chance on this tremendously important asset, two billion dollars over a ten year period, not just an ordinary little tax, to make sure that it won't be dissipated by some.

(Senator Guarisco) You see what I have a problem with. I think everything that you are saying is absolutely correct. I think it's to say that I don't want to dedicate the tax sounds irresponsible, yet I want to try to feel that first of all that we maybe have conditioned the electorate to distrust us. I don't want to, I think the answer to this type of issue is to elect responsible people to government and not to hogtie future legislators and the future government of the state. I just want to mark my protest and I am for the rest of it. I think the idea is good. I think the statutory dedication is good and everything else, but I just am afraid to lock in this to the constitution. I think one day we will probably be sorry.

(Senator Hudson) One of that initial proceeds account the only thing that can be expended for so called emergencies is the interest or the earnings which resulted from the investment.

(Mr. Tauzin) Well, actually the initial proceeds account can not be spent period. It is just the earnings.

(Mr. Hudson) And only pursuant to the restrictions which are imposed upon by the Bond Commission.

(Mr. Tauzin) That is correct. And that is one of the reasons to further answer Tony, the amendment is as long

as it is. The protections are all specified in here very carefully.

(Mr. Hudson) I just wanted to know if you concurred with my reading.

(Mr. Tauzin) You are correct.

(Mr. Hudson) Also, I don't particularly have a hang-up about constitutions amendments although the proponents of this bill have been successful in killing several of my bills by constitutional amendment. I guess it is how important it is and based upon how many votes you have. I can see a distinction between this and where you are dedicating funds because of the uncertainty of the legal success of retaining those funds to where you dedicate a source of money which is subject to sections of the state or various constituency buying for money and blocking it in that way. So I can see how this would assure the people that if it were successful that we know the purpose of which they voted on it and if it wasn't that they were assured of seeing that remedies were made without imposing a future tax.

(Senator Eagan) Are there any other questions? If not, Senator Sevario moves for a favorable report.

(Senator Guarisco) I object.

Roll call vote taken:

YEAS: Barham, Braden, Hudson, Poston and Sevario

NAYS: Guarisco

(5 to 1) Bill reported favorably.

(Representative Tauzin) Gentlemen, I know you can act quickly on it. House Bill 767 is the statutory dedication that parallels to the constitutional dedication that sets up the mechanism for the use of the Barrier Island Trust Fund which is a provision of the secretaries of the Department of Wildlife and Fisheries, Natural Resources, and Transportation to jointly meet each year and recommend to the Governor those projects that are being most useful and beneficial to protect the Barrier Islands. They

are being included in the governor's annual budget to the legislature.

(Senator Eagan) Are there any questions? Senator Sevario moves for a favorable report. Is there any objection to a favorable report? Hearing no objection the bill is reported favorably.

(Representative Tauzin) Mr. Chairman and members of the committee, the next bill is the first use tax itself. Again, let me hit it real quickly for you and then perhaps I can answer your question. The first three sections that are in Section 1301 describe the state policy. They are basically the conservation of our resources and inequitable treatment presently provided for natural gas produced in Louisiana and that which is brought from outside Louisiana. Secondly, the impact upon our waterbottoms, Barrier Island, coastal areas because of the production and the transportation and development of that resource in Louisiana. Thirdly, it is declared that the first purpose of the tax is to require the extraction of exaction rather of a fair and reasonable compensation of the citizens of this state for the cost incurred if paid with public funds costing you — the benefit of the owner of the natural gas which is produced beyond the boundaries of Louisiana. So that we are saying in effect that the purpose is indeed to make the owners of the resources who benefit from it compensate us for providing the state services and for excepting a risk and the impacts that would come along in providing this resource for them. We have defined use which is the most important definition on Page 3 as the sale, the transportation in the state to the point of delivery and — to the processing plant. The transportation to the point of delivery at the end of measurement, a storage facility to transfer the possession of a control or processing for the use of manufacturing treatment action to a point within the state as the uses that are declined. Now the first use that occurs is the use that is taxable. We have a roll-over provision so that if the courts should rule that the first use that we detail here is a non-taxable constitutional use, then the next use becomes the tax that

we use so that we have a roll over of those uses. The first taxable use under our constitution becomes the first use tax under this bill. The owner is specifically declined as a person who has title to and the right to alienate the natural gas despite the fact that it temporarily surrenders possession or control of the product to the producer at the processing plant so that we are tying it down to the owner of the natural gas itself which is as I told you in 85% of the cases is the pipeline companies. The next section imposes the tax and measures it at the rate of seven cents per MCF on the product. That is to correspond to the state severance tax. This tax, the user tax, corresponds to our state severance tax. In subsection C is the section that you will probably hear from the oil companies on. It is in furtherance with the policy we described above. The tax is deemed to cost the associated uses made by the owner in preparation for the marketing of the natural gas. It is not to be construed or interpreted as a part of the cost of processing which the producer has to pay under his contract and that particular clause is the one which says that the courts shall not interpret those contracts to allow the pipeline companies to pass the tax back on the producer who would have to pass it on to his customers who only own 5% of the resource and we declare that to be expressly against the public policy of Louisiana. The other provisions of the bill relative to measurement and commingling attract the language in our severance tax statues to provide the same mechanisms by which the Revenue Department would measure the tax. The Collector of Revenue, of course, has the authority to promulgate the rules and regulations and to require the reports and reimbursement. The bill provides that the act is effective immediately, however, the tax will not be collected until April 1979 That is to give the pipeline companies the nine months they need to begin collecting the tax in their rate base from their customers. Now there is only one pipeline company that tells us that they will have any difficulty in meeting that deadline and that is United Gas who has presently a rate base case before the commission, but they are quite satisfied with the April date. They think that

this will just about accurately cover it. The bill provides and this is important that if Subsection C in Section 5 of the Act, that if Subsection C can not have effect we are wrong. We can not prohibit that interpretation of the contract. If those contracts mention taxes in any of those contracts which mention taxes as to those contracts the tax is null and void. If the contract does not mention taxes and the court rules that we can not prohibit that interpretation, the cost or processing — then the tax itself is null and void. That provision of Section 5 is the nonseverability provision in reference to the producer's contract and that is very important because it means that if we are unsuccessful in measuring the tax against the pipeline company who then collects it from his customers, we can't accomplish that then the whole measure is null and void. That is to protect against the impacts upon producers and processors here in Louisiana. That is the bill.

(Senator Eagan) Let's hear if you will excuse yourself for a minute, we will hear from the opposition.

(Alan Breaud) Mr. Garner, Mr. Woodard, Mr. Slaton

(Senator Eagan) Gentlemen, if you would just be seated. Mr. Garner you will be first, if you will.

(Mr. Slaton) Mr. Chairman, I would like to go first if you would.

(Senator Eagan) All right.

(Mr. Slaton) Mr. Chairman, members of the committee, my name is G. R. Slaton and I represent the Mid Continent Oil and Gas Association. This organization is a trade association which represents the individuals and companies who are responsible for the production, marketing, and transportation, refining for about 92% of the oil and gas which is produced in this state. I have a testimony here that I would like to read to you and if you got any question, you can stop me and I will be able to go back to where I was because it is a rather complicated issue. The proposal by Mr. Tauzin as he has explained is an attempt

to levy a first use tax on natural gas produced offshore in the federal zone and is brought into Louisiana. This idea was first conceived in this state approximately ten years ago and in an effort to make it constitutional it has been changed considerably to take a shape of the bill that you have before you, House Bill 768. All this forms, those pushing the issue have vouched for its constitutionality. Those opposed have denied it. The same applies for this bill. This issue has been on the House side numerous occasions, but this is the first appearance before the senate committee. The author has explained to you some facts as to how the handling of natural gas or how natural gas is handled, but I would like to explain it to you in my way so that it would put in proper context my remarks. Offshore federal zoned gas is produced and owned at the time of production by producing companies. At the offshore platform where the gas first comes to the surface, it is purchased by a pipeline company. It is transported from there by the pipeline company in this company's pipeline usually to a onshore gas processing facility. Then on to the final pipeline company. The producer, although having sold the gas, has by the contract of sale retained the right to remove the liquefiables in the gas, and in addition, has agreed to bear the cost of this removal. When the gas arrives at the processing plant, which by the way the plant is owned by the producer, the producer removes the liquefiables which are approximately from 4 to 6% of the total gas stream or the total gas volume. These in products which are your ethanes, propanes, butanes, and natural gasoline are sold mainly to Louisiana consumers. The processed gas remaining which is approximately 95% of the total gas volume entering the plant is returned to the pipeline company to be transported to its ultimate consumer usually out of the state of Louisiana. These are forementioned events in the gas flow apply to approximately 80% of the offshore gas. Some of the gas is brought into Louisiana in pipelines owned by the producers and is transferred to the pipeline company after it has been processed. Some gas is brought into Louisiana for use in Louisiana. However, all these exceptions to the general

rule do not toal over approximately 20% of the total offshore gas. Therefore, the owner of the gas as defined in House Bill 768 is the interstate pipeline company in about 75 to 80% of the cases. It is this entity who must pay the tax levied by this bill, because it is the owner of the gas at time the first use which everyone it might be in Louisiana occurred. The careful attempt to tax the owner is purposely made in hopes that this owner will be permitted to pass this tax levy alone to the ultimate consumer somewhere out of Louisiana. This can be done if the pass on is approved by the Federal Energy Regulatory Commission which is formally the old Federal Power Commission. Because this is not a severance production or other similar tax, the pass on is not automatic and can be approved if it is considered a cost of service much the same as any other pipeline cost. Because of the obvious attempt here to levy a tax in Louisiana to be born only by out-of-state entities, it is my personal opinion that this pass on will not be allowed regardless of it constitutionality. There is no way that the federal government can permit this result. It is the same problem that producing states and producers have been saddled with together. There are too many voters in those consuming states. Gentlemen, the Federal Energy Regulatory Commission is a political body and there is no way in my mind they can allow this tax to be passed on to the people that they must represent. Now when a pass on is denied, the pipeline company will look elsewhere for relief. It certainly is not going to keep the tax if it can get out of it. It has two options which it will possibly pursue simultaneously. In as much as it is the owner and must pay the tax and will probably do so under protest and the allege the constitutional issue in its protest. At the same time, it could possibly withhold from its producers payment for the gas in an amount equal to the tax. This will be done because of the contract that calls for the producer to pay the pipeline company for the cost incurred by the pipeline company as a result of gas processing. The pipeline company will be alleging that the first use of the tax is the processing. The litigation to resolve this issue will probably take several years and a

tax will be held in escrow during this period. To prevent the pipeline company from demanding payment from the tax from the producer Section 1303 Paragraph C of House Bill 768, carefully repudiates the aforementioned contract. Most everyone agreed that this is unconstitutional. I will read for you sections from the *U.S. Constitution* as well as the *Louisiana Constitution* from 1974. The Constitution of the U.S. Section 10 — Restrictions Upon Powers of States — "No state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law imparing the obligation of contracts, or grant any title of nobility." *Louisiana Constitution of 1974* — Article I — Section 23 — Prohibiting Law — "No bill of attainder, ex post facto law, or law imparing the obligation of contracts shall be enacted." Let's see where these facts take us. First, Federal Energy Regulatory Commission probably will not let the tax, no way. Second, the tax will probably be ruled unconstitutional for any other uses that might be claimed. Three, the only resale use defined in the bill of any substantial amount of gas is that related in the processing of the gas. This is also the only use to which this gas has any chance of constitutionality. If this use is constitutional, the contract abrogation clause certainly is not. So at this point the producer would bear the tax. Let me state here, that the author has said from the time he began working on this tax that he had no intention for it to be a burden on either the pipeline company, the producer of the Louisiana consumer. He has attempted to provide for this eventuality by credits which I understand that you will take up at a later date. Recently, he has added a clause making the bill void, if the tax would fall on the producer in the even that the Federal Energy Regulatory Commission denies the pass on, and Section 1303 Paragraph C of the bill is declared unconstitutional. While recognizing and appreciating Mr. Tauzin's efforts to remove the producers from any liability under this tax, we still have some grave concern and fears that we may have to bear

some if not all of the burdens. Because of these fears and the fact that will give you an insight as to why the author came to the realization that he had to protect the producer as much as possible. I would like to briefly explore what would happen if the producer should have to bear the tax. After the act of processing, the producer is left with about 5% of the total gas stream which is in the form of liquefiables which is your propane, butane, ethane and your natural gasoline. This will mean that only 5% of the stream would have to bear the tax levied on 100% of that stream. This could cause propane and butane to increase in price by 33⅓%, if the FBA would allow a price increase. Those commodity prices are still controlled as is that of natural gasoline. Ethane prices are not controlled except but by market conditions and they would probably not permit an increase. But if all of these prices could be increased, the cost would be borne by the Louisiana consumer. Much of the propane and butane increases would be borne by the farmer. The ethane increase by the chemical companies. However, if a producer could not pass along its tax cost, he would attempt to absorb it. I am told, though that many gas plants are not that profitable. This would cause the closure of some plants resulting in a job loss and the loss also of the plant's products for Louisiana use. It should be recognized that as the price of gas increases, it becomes less advantageous to process the liqueifables. The liquefiable could be left in the gas stream and would increase its BTU content. The pipeline companies sell their gas based on BTU content and would welcome this commodity. Additional processing costs as a result of this tax would be another factor making it less advantageous to process and more profitable of the Federal Power Commission and now the Federal Energy Regulatory Commission to approve gas sale contracts wherein the producer retains the right to process for the liquefiables. There is now action pending wherein the northern consumers making a demand for this valuable part of the gas. Any action by Louisiana to tax interstate gas to cause the federal government to demand that these liquefiables be left in the gas. As the shortage of gas intensifies, this

possibility grows stronger and I ask you how could our farmers and chemical companies be without this supply of liquefiables. To sight another example of what can happen if this bill is passed, may I can your attention to a New Mexico law providing for the level of a tax on electric power. Some of this electric power was exported to adjoining states and a credit was given to New Mexico electrical users for the amount of the tax. This effectively exported all the tax. Something like House Bill 768 would like to do. I would like to read it for you the *Tax Reform Act* of 1976 by the U.S. Congress. *Tax Reform Act* of 1976 — Title II — Discriminatory Laws — Section 201 — "No state or political subdivision thereof may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-state manufacturers, producers, wholesalers, retailers or consumers of that electricity for purposes of this section a tax is discriminatory if it results either directly or indirectly in a greater tax burden on electricity which is generated and transmitted in interstate commerce and on electricity which is generated and transmitted in intrastate commerce. This is one example of what can happen. Another question can be asked is how will Congress react in a treatment of a natural gas bill presently before that body if this bill is passed. I think we would have to consider that. As you know, Congress doesn't sympathize with producing states. They never have, and I don't think they will. Nor for that matter do they sympathize with the producers. They could react and do something about allocation of intrastate gas or to deal with a most recent problem area in this federal proposal, how might they react to the issue of the severance tax. Senator Johnson was able to get some temporary relief. I say temporary because the bill hasn't passed yet. By allowing the severance tax to be added to the congressionally mandated gas prices, we hope this bill not cause the confrees to change their mind on this issue. Let's look for amoment at the tax credit bill. Representative Tauzin and Representative Laborde have in House Bill 1187 attempted to provide a means for the producer to be reimbursed for the first use

tax if he must finally bear. I would suggest to you two things to consider when relating that bill to this one. First, in many cases the producers will not be able to receive enough credit from the severance tax that we are paying for the first use tax. As our Louisiana production decreases and offshore production increases more and more, producers may fall into the category of not being able to recoop all their losses from the severance tax. Secondly, House Bill 1187 provide only a credit. As we have seen in the pass, these credits have a habit of leaving us from time to time. One legislature passes a credit and the next one repeals it. I have heard somebody say that the difference between a credit and a subsidy is four years. We are very much concerned that this could happen in this instance. Gentlemen, there has been no need shown for a tax at this time. Only because the idea proposes to tax out-of-state gas consumers, do you give any serious consideration to this bill. All of you know that there is no such thing as a free lunch. This legislation, if it works as the author desires, in my opinion, can still be detrimental to this state and its citizens. It can cause the federal government to take retalitory such as forbidding the producers to process the gas. Again, I ask you where would we be then as far as our supply of ethane and butane for our farmers and our chemical companies. This legislation * * *.

(Changing the tape)

(Senator Eagan) I don't want to set a time limit. Can you give me an approximate time of how long you will take, Mr. Garner.

(Mr. Garner) It will take around twelve minutes.

(Senator Eagan) Well, that's fine.

(Mr. Garner) Mr. Chairman and members of the committee, I am A. C. Garner, Jr., Manager of the Southeastern Production Division of Exxon Company, U.S.A. Southeastern Division is headquartered in New Orleans and encompasses Louisiana and several other states and Louisiana OCS area. I appreciate the opportunity to

appear before you to discuss Exxon's views and oppostions to the proposed first use tax. I would like to stress that point that Exxon has never withdrawn its opposition to this first use tax. We are opposed to this tax because we believe that it would be detrimental to Louisiana, because it attempts to abrogate contracts entered into freely by private parties and because we believe the tax is unconstitutional on several counts. Mr. M. Truman Woodard, Jr., Senior Partner in New Orleans firm of Milling, Benson, will discuss the major constitutional effects of the first use tax for you in a moment. We have several major points that we would like to discuss with you today. First, we do not believe that the Federal Regulatory Commission will permit pass through of the first use tax either on an interim basis or a ultimate basis. We believe there is a potential impact of this major that could be detrimental to plants recovering ethane, propane and butane from offshore gas for use in Louisiana by Louisiana industries and rural consumers. We believe the uncertainty is created during prolonged litigations and the intrusion of the state into private contracts will impair the investment climate for Louisiana, for Louisiana gas processors and the petro-chemical industry in this state. With these points in mind, let's take a look at how the first use tax is suppose to work. Representative Tauzin made quite a detailed account of how this tax would work so I will not belabor those points again. The pipeline companies are expected to pass this tax on to gas consumers outside the state of Louisiana. It a Louisiana producer is unable to pass on the tax or if Louisiana consumers are affected by the tax because they use intrastate gas, first use credit bill have been designed to protect the producers and consumers in this state from this impact. While we realize that the possible operation of this legislation is subject to speculation, we believe, that there is a logical series of events that most probably will occur. They are not the events, we think, proposed by the proponents of the first use tax. We share the frustration of Louisiana and other producing states over a continuation of federal price controls that have held gas prices at unrealistically low levels since

1954 and that have held prices for crude oil at unequally unrealistic levels since 1971. Exxon has consistently called for an end to price controlls on natural gas and crude oil. Exxon has consistently urged the formulation of a national energy policy as recognized as a vital role that producers in producing states must play in helping this nation meet its energy needs in the year ahead. Gentlemen, how can any of us really expect the Federal Energy Regulatory Commission the old FPC which have kept natural gas prices at such low levels since 1954 to permit Louisiana to collect more than $200,000,000 a year from gas consumers outside of Louisiana either ultimately or even during the years of prolonged litigation while the constitutional issues of a first use tax are debated in the courts and possibly in Congress. We believe that to expect even interim pass through of this tax is unrealistic. Now let's think for a moment about what happens to this first use tax if the FREC tells the interstate gas pipeline companies they can't pass the tax on to out-of-state customers. Exxon sold its gas to the interstate pipeline companies at these offshore platforms, we reserve the right to recover the ethane, propane, butane and other natural gas liquids from the gas when they came ashore. Most of the gas liquids that we recover are sold right here in Louisiana. In return for the right to recover these liquids, we agreed in our contracts to assume all costs associated with processing the gas to recover the liquids. We believe that if the FREC refuses to allow interim pass through of the first use tax during the years of prolonged litigation, the pipeline companies will seek to recover the cost of tax through this contract agreement in which we the producers agreed to assume all costs of processing. We think this is highly likely since at least three of the taxable first uses occur only because we are exercising our right under these contracts to recover the gasoline. The primary one is the processing of the gas. Is the pass back of the first use tax for the pipeline companies to the producer that the first use tax bill attempts to prevent by stating in Section 1303 C that any agreement or contract by which a owner of natural gas at the time a taxable first use is heard that is

the pipeline company claims the right to reimburse on a refund of such taxes from any other party interests other than the purchaser of such natural gas a producer is hereby declared to be against public policy and unenforceable to that extent. The policy of the bill — you can easily refer to this as a contract modification. must not be dilluted by this exercise and . The fact is that the state is attempting to make unenforceable a provision of a contract entered into freely by two private parties. No matter how you do it, that is abrogation of contract. Such abrogation is certainly unconstitutional and is clearly prohibited by both the 1974 *Louisiana Constitution* and the *U.S. Constitution*. We have no doubt that the courts ultimately will strike down this provision. However, in the meantime, we believe, that Louisiana will send a clear message to business in the rest of the country that private contracts are not safe in this state. Let's get back to the question of what happens to the tax. When the pipeline company tries to pass a tax back to the producer in violation of Section 1303 C. The producer can go to court and attempt to obtain a preliminary injunction and join the pipeline company from passing this back. If the producer wants to receive full credit for the gas, the producer must attempt to uphold Section 1303 C in court. The inflation defending contract abrogations which is important to us. If the courts deny the producers of the preliminary injunctive relief under an amendment which we understand will be offered to House Bill 1187, the producer would then be eligible for a credit against severance tax. We appreciate the author's efforts to address the problems at Exxon and other members of industry have raised during the course of discussions on the first use tax. Amendments to both House Bill 768 and House Bill 1187 might help to reduce essential impact of the first use tax on Louisiana industry and rural residents. However, we believe there are several problems with these protective majors. The track record of industrial tax credits in Louisiana is a poor one. The manufacturers gas tax credit, for example, repealed in 1972, reinstated in 1973, repealed again in 1977. The time comes when

Louisiana producers or consumers need to rely on the credits for protection from the impact of the first use tax. Will the credit be there? Will the money be there to pay the credit? In the case of producers, there is another serious question. The severance tax liability of producers in Louisiana is declining as our onshore production declines while potential first use tax liability is increasing in new field offshore of Louisiana brought to full productive capacity. As mentioned by Mr. Slate, the result is very possible to be that first use tax liability of producers may see their severance tax credits forcing them to bear increasingly large portions of the first use tax. If for some reason these credits are either negated or not available, what impact will that have on the producers who recover ethane, propane and butane from offshore gas at plants in Louisiana for use by Louisiana customers in industry. The producer may be able to pass some of the tax along to gas purchasers, if he owns the gas when the tax is incurred. If he does not own the gas, and this is the case where 85% of the gas coming from offshore and in our case it is 95% of the gas, then the producer has two alternatives; pass the tax on to the price of ethane, propane and butane or consider discontinuing operations made unprofitable by the tax. Let's discuss the first alternative for just a moment. Could the producer recover the cost of tax and product process. If the credit were not able and Exxon was forced to bear the full effect of the tax, we estimate that the net maximum initial impact on Exxon in 1979 to be as high as twenty-two billion dollars. Based on our 1979 forecast of operations, we would have to increase propane, butane and ethane prices between 5 and 6 cents a gallon to recover that impact. Assuming the ability to ultimately recover some or all of the additional costs through price increases the impact will fall directly on Louisiana consumers who purchase these products. In the case of ethane, the major raw material for Louisiana petrochemical plants, the prices are not federally regulated thus recovery of added costs through higher prices is contingent on market conditions and contract provisions. Attempts to increase ethane prices would likely fail in the

face of present and foreseeable market conditions. Ethane purchasers could reasonably be expected to look to lower costs supplies in neighboring states as comparison of 60% of ethane produced in the U.S. as produced in Texas where about 19% of the total is produced in Louisiana. So attempts to raise prices sufficiently maintain profitability on process in operations are not likely to be successful. If we are unable to recover th cost of the tax, then propane, butane, and ethane prices, the only alternative is to review the continued recovery of these products specifically, applying the seven cents per MCF tax on a 1977 enter stream going of mine plants which we own or in which we have an interest. Processing of our gas would become uneconomical in seven of the nine unless we could claim the credit against our severance taxes or recover costs through our product process. I should emphasize that this impact results on a before tax and a before depreciation basis. The same general impact is anticipated on a 1979 operations as well. The second alternative then is to phase out liquid extraction operations at the earliest possible moment. Ultimately such action will reduce the liquid supply for rural consumers in the petro-chemical industry. As individual companies reach these decisions there is a compound impact on these that are joining on by several companies. Eventually as the extracted void and declines, entire facilities could become uneconomical and joint owners could decide to close them down. The net result is then magnified by the loss of the entire output of these facilities including any offshore gas or any onshore gas that is being processed in the plant. The proposed litigation will have impacts on Louisiana gas industry reaching far beyond the economic impacts just outlined. It encourages strive of litigation between parties to contracts and rate schedules. The extensive legal cost incurred and many years of effort that would be lost in this activity are not counted in the early economic impact assessment. Neither does that assessment include cost of huge sums of capital likely to be tied up in escrow for years for a law suite and appeals as tried. However, more serious than the immediate economic impact is the precedent that would be

set by this legislator or bonafide contract provisions between private parties were to be nullified by the legislative . Sanctity of contract is vital tenant of America economic life and the idea of violating it would be repugnant to all of us. There is one further aspect of a broader nature I believe merits you consideration. Louisiana is widely recognized as a state which has the leadership in development of energy resources for the nation. The state's leaders have been in the forefront of those recognizing the need for comprehensive national solution to domestic energy problems and in setting examples for other states with a resource potential, however the actions proposed in this legislation could cause serious negative effects on the state in the future. In this regard Congress has already outlawed discriminatory state taxes on generation of electricity for the interstate market in the Tax Reform Act of 1976. I would like to now call on Mr. Truman Woodward to address the constitutionality of this first use tax.

(Senator Eagan) Again, Mr. Woodward, I don't want to set a time limit, but what do you think your presentation will take.

(Mr. Woodward) Ten to twelve minutes. Call me and I will cut it short. Mr. Chairman and gentlemen of the committee, I have to start off by first disagreeing with Governor Edwards. I do not believe that the recent decision in the U.S. Supreme Court show any tendenacy of changing the rule with respect to either of these two constitutional questions. In so far as the first validity of the use tax itself is concerned, the interstate commerce clause of the Constitution vest in Congress the right to regulate commerce between the states. The supremacy clause of the U.S. Constitution provides that Congress in any area where the federal government has control has superior power and supremacy over any state law. Under that, Congress has passed the Outer Continental Shelf Act which prohibits any taxation of outer continental offshore gas. It has passed the Natural Gas Act giving control of

all regulatory procedures of the Congress and to the commission and it has passed as you have heard, the Tax Reform Act of 1976. Under the interstate commerce clause, the Supreme Court for over the years have followed a very simple procedure. They have said that the state may tax to the extent that it was necessary to provide state revenues where it did not interfer with the operation of interstate commerce. This caused the court to have to decide the cases on a case by case basis. Over recent years, the courts have adopted four rules which they say that may tax levied by a state must follow all four, not any one of them. It must not be discriminatory. It must have a sufficient connection with the state. It must be fairly apportioned and it must provide an equal benefit to the taxpayer. House Bill 768 doesn't qualify under any of these rules. The last two cases that have been decided, both in the last two years, were the Washington-Stevedoring case and the Mississippi case called the auto transit. In both of these cases, the U.S. Supreme Court upheld the tax on the ground that it levied equally on intrastate as well as interstate action. It apportioned the taxes between them and it levied a fair benefit because he state provided the highways over which they would use the Mississippi and the minimal requirement need in the state of Washington. In this particular situation, this Bill 768 exempts all Louisiana intrastate gas from the tax because it doesn't, because it has paid the severance tax. It exempts all gas that is passing through Louisiana from another state on which it has paid severance taxes. It is clearly discriminatory to tax this gas which moves through Louisiana without taxing the same procedures on the Louisiana gas without taxing the same procedures that take place with respect to Texas gas. And furthermore, we found that with a minimal of effort that there is a further gross discrimination in that there is 48,000,000 cubic feet of gas today that moves through Louisiana from the outer continental shelf of Texas pays severance taxes to Texas and is processed in Louisiana. Now if you don't levy the processing on that gas, how are you going to levy it on the gas coming from the outer

continental shelf. It is clearly discriminatory. The seven cent severance tax which is levied by Louisiana is based upon the wrenching from our soil a nonrecoverable resource. It does not apply to the uses that are being the bases for the tax under House Bill 768. The measuring of the gas, the passing through a pipeline or even the processing of the gas, but even as the proponents of this bill say that it is the processing that they find to be of sufficient use in the state so that it can be levied. There is processing taking place in Louisiana of Louisiana gas that is not being taxed and even more closely aligned there is processing taking place in Louisiana of Texas gas which Texas has paid, collected a severance tax. Now all of these other uses in Louisiana are not taxes, only the severance from the soil. Here again is a discrimination. The tax is not fairly apportioned. It is not apportioned at all so it violates that rule. There is no benefit that is given to the taxpayers here that isn't given to Louisiana gas or to the Texas gas passing through or to the Texas gas that is being processed. All of that gas passes through pipelines that pay ad valorem taxes on it. They all pass through processing plants on which ad valorem taxes are being collected so there is no additional benefit. Both of the two cases that were decided by the Supreme Court in the last two years say the semantics are unimportant. It doesn't make any difference how you label this tax. It doesn't make any difference what you call it. It doesn't make any difference how you dress it up. The court cuts right through to see whether this is an unlawful discrimination, an unlawful apportionment, an unlawful benefit on a unlawful tax on a connection that doesn't exist with the state. This tax does all of those things. In addition, you call this a use tax, but a use tax has been described by the United State Supreme Court as being not constitutional unless it is a use within the state and they don't mean stopping. They mean that it has to be consumed. The use taxes that have been permitted were use taxes which were equivalent to sales taxes that the tax could not collect because the property was bought in another state and brought in so that this is not a true use tax under the U.S.

Constitution. The Surpeme Court has defined use taxes and this does not meet that qualification. In addition, it violates the rule of dual process of law, because it is taking the property of these taxpayers without adequate compensation. Now let me dwell briefly on the question of impairment of contract. The free enterprise system requires both the due process and the nonviolation of that clause. We can not have a free enterprise system in this country without both of those two qualifications. The courts have said that in a change with respect to that clause a state does have police power violates the health or the welfare or the moral of the people there can be restrictions. But it is only in those circumstances and it is held that it can not be arbitrary which this one is. It can't be oppressive which this tax is. It can't affect one class and not another. It has to be for the general benefit of all the people in the state for it to be effective. It can not be a question of policy or social obligation and if it is to produce revenues, let me point out to you, that it doesn't make any difference to the state of Louisiana which of the two contracting parties pay the tax. It is just a shifting by the state of the burden from one taxpayer to another so you can't base it on the fact that the state needs the revenue even if it does. The state is not collecting it as a revenue tax. The state is collecting a tax which it hopes can be exported outside of the state to the consumers. Under all three of the legislative enactments, the OCS Act, the Natural Gas Act and the Tax Reform Act, is impossible to do this. The proponents of the acts say that this is a minimal modification of a contract. It is just a modification. It's not an impairment of a contract. Let me point out to you that there is $170,000,000 that would be affected by this and that is certainly not a minimal nodification. Moreover, as far as the impairment is concerned the U.S. Supreme Court and other cases, other State Supreme Courts have said that a mineral lease which has a provision in it that the lessee or the lessor shall pay taxes upon the revenues from this must be abided by the state can not change the burden from one to the other and certainly the provision in a mineral lease as to who is

going to pay the taxes is a very subordinate provision to the lease as a whole which is a right that the company gets to go in and get the oil or the gas or the other minerals. So this is a peripheral and ancillary operation in a mineral lease that the Supreme Court has said specifically can not be changed by the state and impose a burden on one when the contract between the parties as levied on the other. I only want to point out one more thing and that is that just last year the united States Supreme Court had a question with respect to this — the New York Trust Company against the state of New Jersey and I am going to read you two sentences. "A state could not adopt as its policy the repudiation of debts or the destruction of contracts. Complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the state's self-interest is at stake. We do not accept this invitation to engage in the utilitarian comparison of public benefits and private rights." Thank you very much.

(Senator Eagan) Thank you gentlemen. I appreciate it. Mr. Tauzin, you have the right to close.

(Representative Tauzin) I will make it brief. The only issue they have raised in regard to the contracts is and I am going to say just a few short things. In 1954, the United State Supreme Court itself turned over regulations of interstate natural gas, the Federal Power Commission and rewrote every natural gas contract in this country. They left the title and the signatures on it and that is about it. In 1976, the U.S. Congress wrote off the most favorite nation's provisions in natural gas contracts. They wrote it right off. Today, FERC is daily rewriting contracts everyday. We had an oil company testify that although the production from a certain field had dried out, that the delivery requirements had run out under the contract, nevertheless, is requiring them to dedicate any new wells discovered to those old customers. Their contracts have run out a long time ago. They have extended and rewritten those contracts for the benefit of the customers who happen to live in those populated areas . No, this is not abrogation. We simply provided

that you can not interpret the contract to provide this pass back. The public policy is the tax will be apportioned upon the owners who presently don't contribute for the impacts they make on this state. Why is it fair and nondiscriminatory? It seeks to end discrimination. The discrimination is present today. The discrimination is that Louisiana natural gas and the buyers and users of Louisiana natural gas pay a seven cent severance tax. The buyers and users of OCS federal gas are paying no tax. The federal courts in a case in Mississippi, the Brady Case, and the Stevedoring case in Washington which over ruled a long line of decisions that said the state can not tax interstate commerce and said yes, a state can now tax interstate commerce effective now. It said very clearly you have to do it in a way that it does not discriminate against products that are already taxed, and that is why the Texas gas already taxed is . That is why the bill only addresses itself to natural gas that is not already taxed to create fairness and equity and to end discrimination. That is what that is all about. As to the pass through, you think the federal government won't allow the pass through, let me tell you something. The pipeline companies in this country are the only players in the game protected with a ten per cent return on top of cost of operations. FERC has to give them that, must give them that and will continue to give them that. You know why? Because the pipeline companies are serving those multitude, those millions of people benefiting from Louisiana and Texas gas. I'm not going to let those pipelines shut down. If this tax is constitutional just as ad valorem taxes are constitutional and have been allowed to be passed through, FERC is going to have to allow this particular tax to pass on through. It is going to have about a four cent, I think, impact eventually against the cost in the neighborhood to two dollars. That is the size of it on the national market. FERC can not allow those pipeline companies to lose money. If they operate efficiently, they are going to make a ten per cent profit today, tomorrow and for as long as those customers require that natural gas. Gentlemen of the committee, everything you read about impacts, liquefi-

ables and the processing, every thing you heard, were the arguments made by these gentlemen before we amended the bill. it can not happen. They know it can't happen. The bill provides a null and void clause. If there is any impact, the bill is null and void. All this surmising about what would happen if they had an impact was nice. I assume you enjoyed listening to it, but is has no irrelevance to the bill anyu longer. It can be no impact upon the producer processor, because if it occurs the bill is null and void. It is that simple. All that business about if that happened is just not so. As for the federal government not allowing the processing in Louisiana, you ought to know. You know where the impact of allowing all that liquid to remain in the gas is that it increase the BTU content by 1.1%. That is all. You know what it provides? It provides something like forty billion tons of ethane that is the main product processed out which is turned into countless scores and millions of products used by people all over this country that this country can not do without because that is the only source of it. The only reliable and economical source of it. That is not going to happen. The processing is going to continue right along. Once you worry about reaction. Let me tell you about reactions. I told you what Congress is presently doing. Congress is enacting an act which recognizes the state's right to impose user taxes on energy development. Let me tell you about the reaction that has been going on in this country. Why should Louisiana ask these other people to pay us a reasonable compensation? Let's talk about those other people. Do you know right now those other people who are protected by the federal government are buying natural gas from Louisiana at one-third of the prices your citizens who voted for you are paying? Do you know that? People in New York and New Jersey. And on top of that when that occurs the lost to the state's treasury in Louisiana in severance taxes and royalty income on the production of oil and gas; you know how much we are losing annually because of those price controls. Not only the fact that we are paying 3,000 more in Louisiana in subsidizing to that extent we are losing $500,000,000 a year in income

because of federal price controls that are designed to protect those people from New York who the people are concerned about saying that they shouldn't have to pay any compensation in Louisiana. You know what else is happening in the country? A thing called entitlements. You know that $15 a barrel of Arab oil is coming into the west coast? You are helping pay for it in Louisiana. $2,000,000,000 worth of impact in the southwest. Under the entitlement program the cost of that barrel of oil delivered to Massachusetts is spread out among the rest of us. There is a bill in Congress right now that would add another part to the entitlements program that would cost Louisiana citizens 10.4 million dollars a year to help pay the utility bills of the people living in New York, New Jersey and Massachusetts. Reaction! I think maybe it is time for us to consider the interest of Louisiana. Reaction, let me tell you what is heppening in the country. If we pass this tax on natural gas, there is not a citizen in the country that has to buy our natural gas, if he doesn't want it. If he thinks we are being unfair to him, and he doesn't want to pay that tax, and he wants to burn coal or something else he's got up there he can do it. He doesn't have to pay it. But you know what's happening in the country? We can't use it if we want it no matter how much it's taxed. They are taking control of it — even the intrastate supplies that we develop very carefully for a long period of time. They are taking control — do you know what they are telling us we have to do. We have to burn their coal and they are controlling the prices for us and let me give you the latest. Let me give you the latest — you haven't heard it. Montana — one of the prime sources of western coal coming to the utility companies of Louisiana recently put a 30% tax on coal. The federal government add a 12½ tax and the local government where the coal is produced set another 5% taxes — 47½ taxes that we are going to pay to produce electricity from coal and we don't have a choice you see. If we don't want to pay those taxes on coal we don't have a choice in Louisiana. We've got to burn the coal. You worried about reaction. They've been doing it to us. This is not a bill

brought in any kind of retaliation. However, I want you to understand that the bill is designed strictly and only to provide Louisiana a fair measure of compensation for producing that resource and if done in an equitable fashion, it creates equity in the market place. I urge your adoption of the bill.

(Senator Eagan: The question that is before the committee is House Bill 768. What is the pleasure of the committee?

(Senator Sevario) I move for a favorable report.

(Senator Eagan) Senator Sevario moves for a favorable report. Is there any objection to a favorable report? Hearing no objection House Bill 768 is reported favorably.

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

I, Jerry J. Guillot, Director of Committee Staff Services and Custodian of Committee Records, do hereby certify that on this day, September 8, 1980, that the foregoing is a true and correct copy of the transcription of a tape recording made at the June 26, 1978 Meeting of the Senate Committee on Revenue and Fiscal Affairs concerning House Bill No. 768 of the 1978 Regular Session of the Louisiana Legislature, and that the tape used for transcription was a tape used to record said meeting and that said tape has been in the constant possession of my office with the staff of the House Committee on Ways and Means.

/s/ JERRY J. GUILLOT
Jerry J. Guillot, Director
Committee Staff Services
Louisiana Legislative Council

No. 83, Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

STATE OF MARYLAND, *et al.*,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

ON THE REPORT OF THE SPECIAL MASTER
DATED SEPTEMBER 15, 1980

MOTION OF PIPELINE COMPANIES FOR LEAVE TO FILE RESPONSE TO LOUISIANA'S REPLY TO PLAINTIFF'S EXCEPTIONS AND MEMORANDUM RESPONSE

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IN THE

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OCTOBER TERM, 1980

No. 83, Original

STATE OF MARYLAND, *et al.*,

Plaintiffs,

v.

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Defendant.

ON THE REPORT OF THE SPECIAL MASTER
DATED SEPTEMBER 15, 1980

MOTION OF PIPELINE COMPANIES FOR LEAVE TO FILE RESPONSE TO LOUISIANA'S REPLY TO PLAINTIFFS' EXCEPTIONS

The pipeline companies, intervenor-applicants in this proceeding*, through their undersigned counsel of record, respectively move the Court for leave to file the

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*Columbia Gas Transmission Corporation, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Florida Gas Transmission Company, Michigan Wisconsin Pipe Line Company, Mississippi River Transmission Corporation, Natural Gas Pipeline Company of America, Northern Natural Gas Company, Panhandle Eastern Pipeline Company, Sea Robin Pipeline Company, Southern Natural Gas Company, Tennessee Gas Pipeline Company (a division of Tenneco, Inc.), Texas Eastern Transmission Corporation, Texas

[footnote continued]

attached response to Louisiana's Reply to Plaintiffs' Exceptions with respect to the report of the Special Master dated September 15, 1980.

As support for this motion, the pipeline companies incorporate by reference the grounds set forth in their motion dated November 14, 1980 for leave to file exceptions, and supporting brief, to the same report of the Special Master. By order dated December 15, 1980 the Court granted the requested leave.

Also, as support for this motion, the pipeline companies note that Louisiana has attached to its Reply the lengthy "Proffer of Proof" which it submitted to the Special Master (a document which heretofore was not before the Court). Included in the attached response is the pipeline companies' response to the Proffer, in which it is demonstrated that the assertions in the Proffer do not raise material issues of fact bearing on the issues presented in the plaintiffs' motion for judgment on the pleadings.

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January 12, 1981

Gas Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, and United Gas Pipe Line Company, ("the pipeline companies").

The listing required by the recent amendment of the Court's Rule 28.1 was set out in the Appendix to the Motion of the Pipeline Companies for Leave to File Reply to Louisiana's Exceptions and Memorandum Reply, dated December 5, 1980.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 83, Original

STATE OF MARYLAND, *et al.*,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

ON THE REPORT OF THE SPECIAL MASTER
DATED SEPTEMBER 15, 1980

MEMORANDUM RESPONSE TO LOUISIANA'S REPLY TO PLAINTIFFS' EXCEPTIONS

Despite the length of Louisiana's reply to exceptions filed by the plaintiffs and the intervenor applicants, only a brief response is called for.

Louisiana at the outset reiterates its claim that the plaintiff States are surrogates for the pipeline companies and hence the instant proceeding should be dismissed for jurisdictional and prudential reasons (Reply at 5-13). Louisiana purports to find fresh support for this thesis in

> a remarkable confluence of (a) identical constitutional issues, (b) identical factual statements, and (c) identical supporting arguments (footnote omitted) (Reply at 6).

But, these alleged "identities" do not negate, nor in any way detract from, the differences in interests and perspective between the pipeline companies and plaintiff States. The pipelines' interests stem from the facts, *inter alia*, that the first use tax is by statute imposed upon them, and they are subject to various penalities should they fail to pay the tax. The interests of the plaintiff States, stem from the facts, *inter alia*, that by pass-through, the tax was designed to be, and in fact operates as, a burden upon them and their citizens. In light of these differences in the interests of the plaintiff States and those of the pipeline companies, not only are the plaintiff States not surrogates for the pipeline companies, but the interests of the pipeline companies fully warrant their intervention in this proceeding.

Louisiana also argues that granting judgment on the pleadings without evidentiary hearings is inappropriate when (1) constitutional issues are presented (Reply at 14), and (2) the Court's original jurisdiction is being invoked (Reply at 23). However, neither of these considerations has prevented summary disposition where, as here there is in actuality no genuine dispute as to any material fact. See, *e.g., Boston Stock Exchange v. State Tax Comm'n.*, 429 U.S. 318 (1977), where, on a motion to dismiss, the Court held that the New York tax on its face resulted in unconstitutional discrimination in violation of the Commerce Clause. Similarly, in original actions the Court has disposed of controversies involving states, including specifically Louisiana, withour any evidentiary hearings. *See e.g., United States v. Louisiana, etc.*, 363 U.S. 7, 84-85 (1960); *United States v. Texas*, 339 U.S. 707, 711-715 (1952).

Moreover, the Supremacy Clause and Commerce Clause issues presented by the motions for judgment are based on facial violations, *i.e.*, (1) that the first use tax *on its face* invades comprehensive federal regulatory schemes in violation of the Supremacy Clause, and (2) that the tax *on its face* results in unconstitutional discrimination and risk of multiple taxation in violation of the Commerce Clause. Consequently, as shown in our Brief Supporting Exceptions, there are no genuine issues of material fact standing in the way of granting the motions for judgment on the pleadings.

The foregoing conclusion is in no way undercut by Louisiana's claim that its answer to the complaint of the plaintiff States purports to deny or put into question virtually every material assertion (Reply at 17). The short answer to that assertion is given at page 39 of the brief of the plaintiff States in support of their motion for judgment on the pleadings (quoted at length at page 17 of Louisiana's instant reply).

Nor is this conclusion impaired by the extensive Proffer of Proof, submitted by Louisiana to the Special Master, in which Louisiana sets out its view of the facts and circumstances on which it claims evidentiary hearings are needed for a determination of the validity of the first use tax.[1]

Review of the various assertions in the "summary" of Louisiana's Proffer (Reply at 28-33) discloses that Louis-

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[1] In view of Louisiana's reproduction of its entire Proffer as an appendix to its instant Reply, we have set out in the Appendix hereto our response to the Proffer. As there shown, the assertions in Louisiana's Proffer reflect either alleged facts which are not relevant to, and do not affect, the issues raised in the motions for judgment on the pleadings, or conclusions of law which have already been conclusively determined contrary to Louisiana's position by authoritative precedents.

iana's factual allegations may readily be treated as true or irrelevant for the purposes of deciding the instant motions. The *foci* of Louisiana's proffer are the assertions that there is a distinction between "raw" and "refined" gas, that processing is necessary to convert "raw" gas into "refined" gas, and that interstate commerce does not commence until after the completion of processing at the tailgate of the processing plant. See Reply at 28-33, 37-38. Contrary to Louisiana's claims that these assertions are factual in nature, as to which evidentiary hearings are required, in actuality they constitute legal conclusions – legal conclusions which have been resolved against Louisiana's position by established precedents.

As shown in our Brief on Exceptions at 20-21,[2] it is established (1) that natural gas as it is produced at the wellhead is "natural gas" under the Natural Gas Act regardless of the presence of various impurities and other elements, (2) that such gas (and in particular, the outer continental shelf gas here involved) which moves across state boundaries is in interstate commerce throughout its journey from the wellhead to at least the point of its sale for resale or consumption under the Natural Gas Act as well as under the Commerce Clause generally, and (3) that the processing of the gas in the course of that interstate journey in no way interrupts or affects its continuity. See also Report of the Special Master at 6. With Louisiana's assertions as to raw gas – refined gas dichotomy and the effect of processing thus being unsound and invalid as a matter of law, they plainly do not stand in

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[2]See also our response to the Proffer, at 6-9; Brief on Exceptions of the plaintiff States at 22, 29, n. 12; and Brief on Exceptions of the United States at 15-21.

the way of granting judgment on the pleadings without evidentiary hearings.[3]

CONCLUSION

For the foregoing reasons, and those stated in our brief in support of exceptions to the Special Master's instant report, it is respectfully submitted that the Court should

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[3]Our response to Louisiana's Proffer (Appendix at 14a-18a) summarizes the undisputed matters establishing the propriety of granting the motions for judgment on the pleadings as a matter of law.

hold that Louisiana's tax is void on its face under both the Supremacy Clause and the Commerce Clause.

Respectfully submitted,

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APPENDIX

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 83, Original

State of Maryland, *et al.*,
Plaintiffs,

versus

State of Louisiana

Proceedings Before the Special Master

RESPONSE OF THE PIPELINE COMPANIES TO LOUISIANA'S PROFFER OF PROOF

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In The
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October Term, 1979

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Proceedings Before the Special Master

RESPONSE OF THE PIPELINE COMPANIES TO LOUISIANA'S PROFFER OF PROOF

As their response to Louisiana's Proffer, the pipeline companies submit the following:

I

EVIDENTIARY HEARINGS ARE NOT NEEDED TO DETERMINE THE ISSUES RAISED BY THE PENDING MOTIONS FOR SUMMARY DISPOSITION

By filing a 116-page Proffer embracing some 154 numbered paragraphs and innumerable subparagraphs, Louisiana seeks to create the impression that the consti-

tutional grounds on which the pending motions for summary disposition are based are grounded on extensive factual considerations. The pipelines strenuously disagree with the factual accuracy of much of Louisiana's assertions and submit that any evidentiary hearing to resolve these disagreements would be extensive and prolonged.[1]

However, and more important for present purposes, the pipeline companies further submit that it is not necessary to undertake any such evidentiary hearing. While the complaints attack the constitutionality of the First Use Tax on numerous grounds, the motions for judgment on the pleadings rely solely on preemption by the Natural Gas Act, the Natural Gas Policy Act, the Outer Continental Shelf Lands Act and the Coastal Zone Management Act under the Supremacy Clause; and the failure to satisfy the apportionment and non-discrimination criteria under the Commerce Clause.[2] If the Court is satisfied that there is no material factual dispute with respect to *any one* of these several grounds urged for summary disposition, then it need consider only whether, as a matter of law, the tax should be struck down on that particular ground.

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[1] The pipeline companies do not regard the Master's instructions as calling for a specific denial or admission of each allegation in the Proffer. However, if the Master desires such a response they would undertake to submit it.

[2] In addition to the issues dealt with in the pending motions for summary disposition, the complaints attack the constitutionality of the First Use Tax under the Impairment of Contracts Clause (Article I, Section 10, Cl. 1), the Equal Protection Clause of the Fourteenth Amendment, and failure to satisfy the requirements under the Commerce Clause that the tax have a substantial "nexus" and that it be "fairly related to services provided" by the taxing state.

Examined in the light of these limited grounds, Louisiana's Proffer fails to demonstrate any need for evidentiary hearings for three basic reasons: First, many of the alleged factual assertions relate to issues beyond the scope of the pending motions; second, other alleged factual assertions are in reality questions of law; and third, still other alleged factual assertions are not only contrived but also refuted as a matter of law by established precedents. On the other hand, as shown below (Part III) the material facts relevant to the grounds invoked in support of the motions are really beyond dispute and therefore there is no need for an evidentiary hearing as a prerequisite to the granting of the motions for summary disposition.[3]

II

THE PROFFER FAILS TO DEMONSTRATE THE EXISTENCE OF FACTUAL DISPUTES MATERIAL TO THE GROUNDS RELIED ON FOR SUMMARY DISPOSITION

In this part, the pipeline companies respond to the principal contentions in Louisiana's Proffer. A response tracking the Proffer according to category headings is set forth as an Appendix hereto.

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[3] Despite the Court's alleged "liberality" in allowing development of factual records in original actions involving "sovereign states" the Court has decided several controversies involving such states, including specifically Louisiana, without any evidentiary hearings. See, *e.g.*, *United States vs Louisiana*, 363 U.S. 84 (1960); *United States vs Texas*, 339 U.S. 707 (1952); *United States vs Louisiana*, 339 U.S. 699 (1952); *United States vs California*, 332 U.S. 19 (1947).

A. The Purported Burdens and Adverse Impacts Allegedly Resulting From the Development and Transportation of OCS Gas are Irrelevant

Perhaps the most striking and critical instance of alleged factual assertions which are irrelevant to any issue raised by the motions for summary disposition is the extensive discussion in Louisiana's Proffer (paragraphs 41-52, 63-72, 83-84, 85) purporting to demonstrate that the First Use Tax is justified because it allegedly compensates Louisiana for the burdens and adverse effect of the development and transportation of OCS gas upon the environment and economy of its wetlands.

Northern Natural Gas Co. vs State Corporation Commission of Kansas, 372 U.S. 84, 93 (1963), establishes that such considerations are irrelevant to the determination of preemption under the Natural Gas Act and the Natural Gas Policy Act.

Likewise, these considerations are irrelevant to the determination of preemption under the Outer Continental Shelf Lands Act (OCSLA). As shown in the brief accompanying the pipeline companies' motion for judgment on the pleadings (at pages 43-52), the legislative history of that Act shows that not only did Congress by that Act assert the paramount responsibility of the Federal Government to regulate OCS activity to the exclusion of the states, but Congress did so in the teeth of efforts by the coastal states, notably Texas and Louisiana, to be accorded a right to share in the revenues from, and to impose taxes on, OCS gas production and otherwise provide reimbursement for the environmental and economic damage allegedly resulting from the development and transmission of the OCS gas. And further (brief, at pages 55-61), in enacting the Coastal Zone Management Act (CZMA) and the 1978 amendments to

the OCSLA, Congress intended that the coastal energy impact fund established by the CZMA be the exclusive method for compensating the states for the impacts resulting from OCS development.

Louisiana's attempts to invoke these considerations as a basis for justifying the First Use Tax is misdirected. Congress having spoken, these considerations patently cannot be applied to support the First Use Tax and thereby circumvent the intent of Congress in enacting the OCSLA and CZMA.

Finally, these considerations are irrelevant to those facets of the motions for summary disposition which concern the burden on interstate commerce. At most, these considerations would bear on the nexus and benefits criteria for sanctioning state taxes under the Commerce Clause. However, as noted, the motions for summary disposition are not based on either of these criteria; rather, they invoke only the discrimination and apportionment criteria under the Commerce Clause; and on these, the environmental and economic considerations urged by Louisiana are irrelevant.

It is well settled that all four requirements of the Commerce Clause test must be satisfied to avoid invalidation of a state tax, and hence failure to satisfy any one of them is sufficient to call for invalidation, irrespective of the satisfaction *vel non* of the other three. See, e.g., *Complete Auto Transit, Inc. vs Brady*, 430 U.S. 274, 279 (1977); *Department of Revenue of Washington vs Ass'n of Washington Stevedoring Companies*, 435 U.S. 734 (1978).

B. No Evidentiary Hearings is Needed to Establish That the Tax is Upon Gas Moving in Interstate Commerce

As part of its attempt to demonstrate the need for evidentiary hearings, presumably in connection with preemption under the Natural Gas Act and the Natural Gas Policy Act and burden on interstate commerce under the Commerce Clause, Louisiana places heavy stress upon (1) a contention that the interstate commerce does not commence until after the completion of processing, and (2) an asserted distinction between "raw gas" and "refined gas" with only the latter being suitable for distribution and marketing. Neither of these claims calls for evidentiary hearings.

1. The Commencement of Interstate Commerce Is Not Deferred Until After the Completion of Processing

Underlying much of the Proffer is the basic thesis that interstate commerce does not commence until the completion of processing (see paragraphs 3, 33, 53, 76-80, 102, 104) and further, that since at least the first five uses enumerated in the First Use Tax statue are tied into such processing, neither they nor processing itself are in interstate commerce. (See, e.g., paragraphs 2, 3, 33, 53, 74, 78-80.)

This thesis involves patently erroneous conclusions of law. Whether the processing occurs prior to interstate commerce is a question of law and not of fact. There are several decisions, by the Supreme Court and the Courts of Appeals, which make it clear beyond any question that the movement of a natural gas stream in interstate commerce typically begins at the wellhead and is continuous—irrespective of processing—until the gas is con-

sumed or sold for resale. For example, in *California vs Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965) the Supreme Court held (at 369): "The result of our decisions is to make the sale of gas which crosses a state line at any stage of its movement from wellhead to ultimate consumption 'in interstate commerce' within the meaning of the [Natural Gas] Act."[4]

Such also are the holdings of the various Courts of Appeals. See, e.g., *Deep South Oil Co. vs F.P.C.*, 247 F.2d 882 (5th Cir. 1957), and related cases;[5] *Saturn Oil and Gas Co. vs F.P.C.*, 250 F.2d 61 (10th Cir. 1957), cert. denied, 355 U.S. 956 (1958); and *Public Service Comm'n of Kentucky vs F.E.R.C.*, 610 F.2d 439 (6th Cir. 1979). For example, the Fifth Circuit in *Deep South* stressed (supra at 887-88):

> . . . petitioner's own brief testifies eloquently to the continuous movement of the gas which it sells at the wellhead. Petitioner admits, as, of course, it must, "that there is a continuous flow of gas from the Deep South wells into the gathering system of Texas Gas; that the mass of gas of which the Deep South gas becomes a part moves continuously through the gathering system into a processing plant; that the

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[4] See also *Phillips Petroleum Co. vs Wisconsin*, 347 U.S. 672 (1954); *Interstate Natural Gas Co. vs F.P.C.*, 331 U.S. 682 (1947); *Illinois Natural Gas Co. vs Central Illinois Public Service Co.*, 314 U.S. 498 (1942).

[5] *Shell Oil Co. vs F.P.C.*, 247 F.2d 900 (5th Cir. 1957), cert. den., 355 U.S. 930 (1958); *Continental Oil Co. vs F.P.C.*, 247 F.2d 904 (5th Cir. 1957); *Humble Oil & Refining Co. vs F.P.C.*, 247 F.2d 903 (5th Cir. 1957), cert. den., 355 U.S. 930 (1958). The Fifth Circuit's holdings in these cases are of particular significance since many of the nation's major gas producing areas are located within that Circuit.

movement through the processing plant is continuous; that there is a continuous movement of natural gas from the outlet of the processing plant to both interstate and intrastate destinations. . . .

2. The Purported Distinction Between "Raw Gas" and "Refined Gas" has Long Been Rejected as Without Substance

As part of its effort to demonstrate the need for evidentiary hearings, with regard to the existence of interstate commerce, Louisiana attempts to distinguish between pre-processing gas as "raw gas" and post-processing gas as "refined gas", with only the latter suitable for distribution and marketing (see, e.g., paragraphs 1-6, 11-23, 27, 29-35, 76-80, 87-89, 92-93). But this distinction is contrived, and contrary to established precedents.

Thus, in the landmark case of *Phillips Petroleum Co. vs Wisconsin,* 347 U.S. 672 (1954), in which the Court held that the jurisdiction of the Federal Power Commission under the Natural Gas Act extended to "the rates charged by a natural-gas producer and gatherer in the sale in interstate commerce of such gas for resale" (347 U.S. at 674), the Court necessarily rejected the notion, now advanced by Louisiana, that a distinction for constitutional and regulatory purposes is to be made between so-called "raw gas" as produced at the well and "natural gas" as it leaves the tailgate of a processing plant.

Shortly after the Supreme Court decision in Phillips, attempts by producers to avoid FPC regulation on the grounds that they sold "casinghead gas," were similarly rejected. See e.g. *Deep South Oil Company, et al.,* 14 FPC 308, 333 (1955), aff'd, *Deep South Oil Company vs F.P.C.,* 247 F.2d 882 (5th Cir. 1957).

There simply is no distinction, either under the Commerce Clause or under the Natural Gas Act, between "raw gas" and "refined gas". Nor is casinghead gas "any the less 'natural' gas because it contains various amounts of other constituents." 247 F.2d at 888. See also *Public Service Comm'n of Kentucky vs F.E.R.C.*, supra; *Gulf Oil Corporation vs F.P.C.*, 128 F. Supp. 44[illegible] (D. D.C. 1955), aff'd, 230 F.2d 40 (D.C. Cir. 1956), cert. denied, 351 U.S. 973 (1956).

In *Mobil Oil Corp. vs F.P.C.*, 483 F.2d 1238, 1241 (D.C. Cir. 1973), the Court of Appeals succinctly described natural gas production and transportation to processing plants and made clear that the presence of other hydrocarbons in the gas stream from the wellhead to the extraction plant does not detract from the existence of natural gas *per se* as a separate and distinct product. This highlights the artificiality of Louisiana's claimed raw gas–refined gas distinction and its related allegations as to processing.

In sum, it is well established that "processing does not interrupt the continuous movement of the gas from the wellhead to consumer burner tips". *Deep South Oil Co. vs F.P.C.*, 247 F.2d 882, 888 (5th Cir. 1957).

C. No Evidentiary Hearing is Needed to Establish That the Tax is Not Fairly Apportioned and Discriminatory.

To support its claim that the First Use Tax is fairly apportioned, Louisiana contends (paragraphs 86-93) that the activities defined as uses in the First Use Tax all relate to the processing of "raw gas" and that, since "processing is a one time event" which cannot be repeated in other states, there is no danger of multiple taxation. However, in order for the fair apportionment criterion to be violated, all that is required is that the

same type of activity, or activity having the same general relation to the commodity and the taxpayer, exists in other states. See *Michigan Wisconsin Pipe Line Co. vs Calvert*, 347 U.S. 157, 170 (1954).

Moreover, the reasons advanced by Louisiana (paragraph 92), to show that the tax is apportioned are irrelevant. A tax is apportioned only if the method of taxation is reasonably related to a taxpayer's activities, revenues or facilities in the taxing state. The First Use Tax is imposed on the entire volume of gas subject to a "use", and the same rate is used to determine the tax of every taxpayer regardless of the extent of that taxpayer's activities in the state. It is thus unapportioned.

Because it is clear on the face of the statute that the other uses, as defined in the statute, are separate and distinct from processing, and also because of the statute's broad definition of "use", no factual inquiry or evidentiary hearing is necessary to conclude that the same gas on which the tax is levied will be subjected to activities similar to those defined as uses after leaving Louisiana, so that states downsteam from Louisiana may impose similar taxes on the same volume of gas. (See pages 63-67, brief in support of pipeline companies' motion for judgment on the pleadings.)

In the brief in support of their motion for judgment on the pleadings (pages 71-81), the pipeline companies demonstrate three ways in which the First Use Tax discriminates against interstate commerce. Louisiana's Proffer does not even address the first such ground: that the tax discriminates against interstate commerce because it is imposed solely on natural gas originating outside the boundaries of the State of Louisiana. (Id., pages 71-75). Indeed, Louisiana admits (paragraphs 1, 81) that only OSC or federal enclave gas is subject to the First Use Tax.

Accordingly, it is plain that there is no genuine issue of material fact with respect to this first contention.

Similarly, the other arguments advanced by Louisiana addressed to the discrimination issue involve legal considerations only, merely calling for an interpretation of the First Use Tax package, including exemptions for in-state uses, the Severance Tax Credit, and the Tax Credit for Electric and Natural Gas Service. (See pages 76-81 of the pipeline companies' brief in support of motion for judgment on the pleadings.)

Louisiana's basic argument on the discrimination issue (paragraphs 36, 60, 94-96), is that the 7 cents per Mcf First Use Tax is the same as the severance tax imposed on Louisiana-produced gas. But as shown in the brief accompanying the pipelines' motion (at pp. 76-78), the purposes for and the activities on which the taxes are imposed are totally different. Accordingly, the taxes are neither equivalent nor complementary, and the First Use Tax cannot be upheld under the "compensating tax" theory used to uphold traditional state use taxes. See *Henneford vs Silas Mason Co.*, 300 U.S. 577 (1937).

Moreover, the severance tax credit enacted contemporaneously with the First Use Tax eliminates the First Use Tax burden on the owners of OCS gas who also produce natural resources in Louisiana.[6] By thus nullifying the First Use Tax liability of mineral producers in Louisiana,

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[6]The three hypotheses, advanced by Louisiana (paragraph 95) in an attempt to show that the Severance Tax Credit does not in fact result in discrimination, do not accurately reflect the operation of the Severance Tax Credit in conjunction with the First Use Tax, and ignore the obvious purpose of the Severance Tax Credit to favor domestic producers of natural resources who also own OCS gas.

the severance tax credit violates the requirement that taxpayers similarly situated be accorded equal tax treatment, a condition precedent for a valid state tax. See, e.g., *Halliburton Oil Well Cementing Co. vs Reily*, 373 U.S. 64 (1963).

III

ALL MATTERS NECESSARY FOR ADJUDICATION OF THE PENDING MOTIONS ARE ESTABLISHED

The pipeline companies submit that all matters necessary for adjudication of the constitutional issues raised by the motions for summary disposition (a) may be judicially noticed by the Court; (b) are established by the relevant statutes at issue;[7] or (c) are established as a matter of law by prior holdings of this Court, and hence there can be no genuine dispute calling for an evidentiary hearing.

The following cannot be disputed and establish that the motions for summary disposition should be granted as a matter of law:

1. The First Use Tax (the tax) is imposed solely on natural gas produced from federal enclaves or beyond the territorial boundaries of Louisiana, and "upon which no severance tax or tax upon the volume of production has been paid, or is legally due to be paid, to [Louisiana] or any other state or territory of the United States, or which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country". La. R.S. 47:1301, § 1303A.

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[7] The relevant statutes, Federal and Louisiana, are printed in the Appendix to the pipeline companies' Motion for Leave to File and Motion for Judgment on the Pleadings with Accompanying Brief (filed November 5, 1979).

2. Natural gas produced from the OCS or onshore federal enclaves is not subject to the imposition of a severance tax or other tax upon the volume of production by any state or territory of the United States, nor is it subject to the imposition of an import tax or tariff by the United States. However, a severance tax is paid on gas produced in Louisiana, La. R.S. 47:631, et seq., and in neighboring states from which gas may be transported through Louisiana. See e.g., Tex. Tax.–Gen. Ann. art. 3.01 (Vernon. 1970); Miss. Code 1942 § § 9417.5-01, et seq.

3. The tax is intended to apply to "the introduction for the first time into the economy of [Louisiana] natural gas which has not been otherwise or elsewhere subject to taxation by or within the United States". La. R.S. 47:1301A.

4. The vast majority of the gas on which the tax is levied is produced from the OCS.

5. The tax applies to gas dedicated to interstate commerce for the moment of its production. See, e.g., *California vs Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); 15 U.S.C. 3301(18).

6. The First Use Tax and its companion statutes clearly show that the tax is aimed squarely at gas produced from federal domains and destined for ultimate consumption by persons in other states, and is designed so that the economic burden of the tax falls exclusively on the pipeline companies and their customers, primarily those in states other than Louisiana.

7. Such gas, as produced from the federal domains, is purchased by the pipeline companies which transport it into or through the State of Louisiana in various streams in interstate commerce, for sale for resale under rate

schedules or tariffs approved by and on file with the Federal Energy Regulatory Commission (FERC), to gas distributing companies and municipalities, and/or direct sale to other customers, all under certificates of public convenience and necessity issued by FERC.

8. These pipeline companies are "natural gas" companies as defined in the Natural Gas Act and are subject to comprehensive regulation by FERC under that Act and the Natural Gas Policy Act. Such regulation by FERC is exclusive, and it encompasses the purchase of the gas from the various producers, its transportation or exchange, and its sale for resale by the pipeline companies. *Panhandle Eastern Pipe Line Co. vs Pub. Serv. Comm'n of Ind.*, 332 US 507, 516 (1947); *FPC vs Louisiana Power & Light Co.*, 406 US 621, 636 (1972); *Northern Natural Gas Co. vs State Corp. Comm'n. of Kan.*, 372 US 84 (1963).

9. In enacting the OCSLA, Congress asserted the paramount responsibility of the federal government to regulate OCS activities. As part thereof, Congress specifically prohibited the application of State taxation laws to the OCS, and barred the states from claiming an interest in or jurisdiction over "the property and natural resources [of the OCS] or the revenues therefrom." The CZMA is designed, *inter alia*, to provide federal financial assistance to the coastal states to compensate them for impacts resulting from OCS energy activities.

10. The tax is imposed "upon the first occurrence within [Louisiana] of any use" of the gas, with certain exceptions as defined in the statute. La. R.S. 47:1303(a). It is "computed at a rate of seven cents on each unit of natural gas as to which a use first occurs within the state", such unit being "one thousand cubic feet of natural gas as measured at a pressure base of 15.025

pounds per square inch absolute and at a temperature base of sixty degrees Fahrenheit". La. R.S. 47:1303(B).

11. "Use" is defined in the statute as:

> "[1] the sale; [2] the transportation in the state to the point of delivery at the inlet of any processing plant; [3] the transportation in the state of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; [4] transfer of possession or relinquishment of control at a delivery point in the state; [5] processing for the extraction of liquefiable component products or waste materials; [6] use in manufacturing; [7] treatment; or [8] other ascertainable action at a point within the state." La. R.S. 47:1302(8).

12. In sum, as pointed out more fully in the pipeline companies' brief in support of the motions (pages 35-38), the incidence of the tax is upon gas moving in, and constituting an integral part of, interstate commerce into, within or through Louisiana, and neither processing nor any other "use" as defined in the statute interrupts such interstate movement.

13. The transportation of the gas through other states downstream of Louisiana would necessarily subject the owner to taxation for the same or similar activities that could as easily be characterized as "uses" as defined in the Louisiana statute.

14. When the gas is actually used or consumed within Louisiana for certain specified purposes, including "the drilling for or production of oil, natural gas, sulphur", "the manufacture of fertilizer and anhydrous ammonia", and processing for the extraction of liquefiable hydrocarbons, such use is exempted from the reach of the tax. La. R.S. 47:1303A.

15. The tax is payable by the "owner" of the gas, defined in the statute as ". . . the person or person having title to and the right to alienate the natural gas subject to the tax at the time a use occurs in the state. It shall not include any person to whom temporary possession or control has been transferred. In the event of a sale the purchaser shall be deemed the owner." La. R.S. 47:1302(9).

16. The statute declares "as against public policy," and makes unenforceable, any contractual provision which would entitle the owner of natural gas subjected to a "use" in Louisiana to recover the amount of taxes paid from any person other than a purchaser of the gas. La. R.S. 47:1303C.

17. As part of the First Use Tax package, the Louisiana legislature enacted (a) the Severance Tax Credit, La. R.S. 47:647 which grants to producers of natural resources in Louisiana who are also First Use taxpayers, a direct tax credit, equal to the amount of First Use Tax paid, against severance taxes owed by that taxpayer to the state; and (b) the Tax Credit for Electric and Natural Gas Service, La. R.S. 47:11, which grants to Louisiana utilities and direct purchasers of natural gas a direct tax credit, against any other Louisiana tax liability, to compensate for increased natural gas costs attributable to the First Use Tax.

The Court need go no further to decide the constitutional issues raised by the motions for summary disposition.

CONCLUSION

As shown in the foregoing response (and as further detailed in the Appendix hereto), Louisiana's massive proffer has not created any material factual dispute that

needs to be resolved for the Court to decide the pending motions for summary disposition.

The pipeline companies respectfully submit that there is no need for an evidentiary hearing and that it is entirely appropriate for the Master to proceed to consider the arguments advanced in support of the pending motions for judgment.

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APPENDIX

RESPONSE TO PROFFER ACCORDING TO CATEGORY HEADINGS

As is pointed out in the text of the pipeline companies' response, the assertions in Louisiana's Proffer either present facts which are not relevant to, and do not affect, the issues raised in the pending motions for judgment on the pleadings, or the assertions are conclusions of law which have already been conclusively determined by authoritative precedents contrary to the position taken by Louisiana.

To aid the Special Master in analyzing the assertions in the Proffer and ascertaining their effect on his ability to decide the pending motions for summary disposition, the pipeline companies have prepared this additional response according to the category headings of the Proffer.

I. BASIC FACTS (paragraphs 1-7; pages 6-7).

The thrust of these paragraphs is that the tax relates exclusively to the processing and refining within Louisiana of "raw gas" transported from the OCS, and that it is the processed "refined gas" and not the "raw gas" that is in interstate commerce, so that the uses which give rise to the First Use Tax occur prior to the entry of the gas in interstate commerce. As shown at pages 8a-11a of the pipeline companies' response, these assertions involve legal conclusions as to the meaning of the First Use Tax statute and the nature of interstate commerce, and contradict well-established holdings as to the nature of processing and its effect on the movement of the gas subject to processing in interstate commerce.

Other allegations in this section, relating to Louisiana's contributions to the nation's energy supplies and the

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*References have been conformed to pagination of Proffer in the Appendix to Louisiana's Reply Brief.

effects of these contributions on the state are irrelevant to the motions for summary disposition as they relate only to the nexus and fair-relation-to-services-provided criteria under the four-pronged test applied by this Court under the Commerce Clause.

II. FACTS AS TO PRODUCTION, GATHERING, PROCESSING, REFINEMENT, TRANSMISSION, DISTRIBUTION AND CONSUMPTION OF GAS ORIGINATING IN THE OUTER-CONTINENTAL SHELF.

A. **OCS Production Activities** (paragraphs 8-18; pages 8-10).

Louisiana's allegations dealing with the location of the OCS and the energy resources located there are irrelevant, except to the extent that they state that all gas subject to the tax originates outside the jurisdiction of Louisiana and that 95% of all OCS gas is subjected to the tax.

The main thrust of the assertions in this section of the proffer, however, is that "raw gas" produced on the OCS and brought into Louisiana must be processed in Louisiana in order to make it marketable. Although the pipeline companies strenuously disagree with the state's description of "raw gas" and its assertions concerning the purpose of, and need for, processing, this disagreement does not create issues of fact which would affect the ability of the Court to address itself to the motions for summary disposition. In making these allegations, Louisiana apparently is attempting to establish that the First Use Tax is imposed before the gas enters interstate commerce. Whether or not processed, the gas is in interstate commerce and subject to FERC regulation immediately upon leaving the wellhead. See text, pages 8a-11a.

B. **Contractual Arrangements** (paragraphs 19-23; pages 10-11).

These allegations attempt to describe various types of contractual arrangements between the producers of natural gas and the pipeline companies which purchase the gas at the wellhead and transport it from the OCS to the ultimate consumers. To the extent that these allegations imply that there is a necessary connection between contracts for the purchase of OCS gas and an alleged need for processing such gas, they merely elaborate on Louisiana's erroneous "raw gas" theory, discussed above under BASIC FACTS and OCS Production Activities.

C. **Natural Gas—An Energy Source** (paragraphs 24-28; pages 11-13).

The allegations in paragraphs 24-25, dealing with the nature and measurement of natural gas, are accurate. Again, however, the main thrust of this section relates to Louisiana's erroneous legal assertions concerning the purported need to process the "raw gas" in order to make it marketable. See discussion under BASIC FACTS and OCS Production Activities, supra.

D. **The Processing or Refining Operation** (paragraphs 29-35; pages 13-14).

The allegations in this section attempt to describe and characterize the operations to which natural gas is subjected during processing. They may be relevant to the "nexus" or "fairly related" considerations (which are not presented in the motions for judgment on the pleadings), but for the reasons stated above, do not affect the propriety of granting the pending motions for summary disposition.

E. **Pricing and Marketing** (paragraphs 36-40; pages 14-15).

These allegations deal with the effect of federal regulation on natural gas pricing and marketing, and as such, advance legal conclusions which do not create any issue of fact. It is interesting to not the admission (paragraph 36) that FERC "is vested with wellhead price regulating authority", with its implicit recognition that the gas at issue moves in interstate commerce from the moment of its production.

F. **Louisiana's First Use Tax** (paragraphs 41-62; pages 16-20).

To the extent that the paragraphs in this section deal with the operation and effect of the First Use Tax, they are argumentative and postulate erroneous legal conclusions. The bulk of this material represents Louisiana's attempt to justify the enactment of the First Use Tax. This is irrelevant to the motions for judgment on the pleadings. Regardless of a state's reason for enacting a tax or other statute, that statute must fall if it conflicts with a federal statute or regulatory scheme in violation of the Supremacy Clause [*Northern Natural Gas Co. vs State Corporation Comm'n of Kansas*, 372 U.S. 84 (1963); *Ray vs Atlantic Richfield Company*, 435 U.S. 151 (1978)]; or violates the Commerce Clause by discriminating against interstate commerce or creating the risk of multiple taxation [*City of Philadelphia vs New Jersey*, 437 U.S. 617 (1978); *Boston Stock Exchange vs State Tax Comm'n.*, 429 U.S. 318 (1977); *Gwin, White & Prince, Inc. vs Henneford*, 305 U.S. 434 (1939)]. These are the issues raised in the motions for judgment on the pleadings, and none of the allegations in this section creates factual disputes with respect to any of them.

G. **Environmental and Economic Conditions** (paragraphs 63-72; pages 20-23).

These allegations relate solely to whether the tax imposed is fairly related under that facet of the Commerce Clause test. The alleged costs and burdens imposed on the State of Louisiana by the taxed activities are irrelevant to the issues raised by the pending motions for summary disposition. See text, pages 6a-7a.

III. STATUTORY FACTS AND QUESTIONS (paragraphs 73-75; pages 24-26).

The majority of the so-called "statutory facts", set forth in paragraph 73 (subparts "j" through "y"), pose legal questions, not factual ones. Subparts "a" through "i" are irrelevant, because it is established by the pleadings that the pipeline companies pay the First Use Tax on one or another of the "uses". Subpart "z", relating to possible differences in the transmission of "raw gas" as opposed to processed "refined gas", is likewise irrelevant because it is established law that the gas is in interstate commerce whether it is "raw" or "refined". See discussion at pp. A-1—A-3, supra.

IV. FACTS SHOWING COMMERCE CLAUSE INAPPLICABLE (paragraphs 76-80; pages 27-28).

The thrust of these paragraphs is that the gas is not in interstate commerce at the time it is subjected to any of the "uses" enumerated in the First Use Tax, because these uses occur prior to processing in Louisiana. These assertions are erroneous legal conclusions, contrary to prior decisions of the federal courts. See text, pages 8a-11a.

V. FACTS SHOWING COMPLIANCE WITH COMMERCE CLAUSE REQUIREMENTS

A. **Substantial Nexus** (paragraphs 83-84; pages 28-36).

Although the pipeline companies strenuously disagree with the assertions advanced in this section, such disagreement does not raise an issue of fact affecting adjudication of the pending motions for summary disposition, because these assertions address the nexus requirement of the Commerce Clause test, not raised in the pending motions.

B. **Relation of Tax to Services Provided** (paragraph 85; pages 37-48).

Again, while the pipeline companies strenuously disagree with the assertions made in this section, this dispute relates to Commerce Clause considerations not presented by the motions for summary disposition.

C. **Apportionment** (paragraphs 86-93; pages 48-50).

The failure of this section to create a material fact issue is discussed at pages 11a-12a of the text of the pipeline companies' response. With the perspective of this discussion in mind, a brief response to the individual allegations respecting the fair apportionment criterion may be appropriate:

Paragraph 86: This paragraph merely contains conclusory agruments; it sets forth no facts.

Paragraphs 87-88: These paragraphs are irrelevant because it is not necessary that the identical "use" to which the gas is subjected in Louisiana be repeated in other states to create the risk of multiple taxation. (See text, pp. 11a-12a). Moreover, they do not accurately describe the function of processing and its effect on the total gas stream. See discussion at pages A-1—A-3, supra.

Paragraph 89: The response to the first sentence of this paragraph is identical to the response to paragraphs 87 and 88. As to the second sentence of

this paragraph, these allegations relate solely to the "fairly related" criterion of the Commerce Clause test, which is not presented in the pending motions for summary disposition.

Paragraph 90: The allegations of this paragraph also relate solely to the "fairly related" requirement and are irrelevant to the motions for summary disposition.

Paragraph 91: This paragraph postulates an erroneous legal conclusion.

Paragraph 92: This paragraph attempts to show that the First Use Tax is apportioned. However, a reading of the statute itself discloses that it is not apportioned, since the tax is imposed on the entire volume of gas, at the same rate for each taxpayer, without regard to the taxpayer's activities, income or facilities in Louisiana or other states. See text, pages 11a-12a.

Paragraph 93: This paragraph, again asserting that the activities taxes under the First Use Tax occur prior to the entry of gas in interstate commerce, runs afoul of long-established holdings of the federal courts and does not create an issue of fact.

D. **Discrimination Against Interstate Commerce** (paragraphs 94-100; pages 50-52).

This section is discussed at pages 12a-13a of the text of the response. As shown below, only questions of law, not issues of fact, are involved.

Paragraph 94: In this paragraph, the state attempts to show that the First Use Tax and the Severance Tax are equivalent taxes, so that the First Use Tax removes a competitive disadvantage presently imposed on Louisiana domestic gas subject to

the Severance Tax. This involves a legal proposition and is plainly incorrect (see pages 71-75 of the pipeline companies' brief in support of their motion for judgment on the pleadings).

Paragraph 95: This paragraph advances an incorrect legal proposition. The hypothetical situations mentioned in this paragraph may be resolved by reference to the First Use Tax Statute and the Severance Tax Credit Statute. No factual development is needed.

Paragraph 96: This paragraph plainly involves an erroneous legal conclusion.

Paragraph 97: The first sentence of this paragraph actually addresses the "fairly related to costs and benefits" issue, which is not involved in the pending motions for summary disposition. It is therefore irrelevant. The second sentence reiterates the erroneous legal arguments advanced in paragraph 94:

Paragraph 98: These allegations relate to the fair apportionment or multiple taxation issue, which is treated above. It is irrelevant to the discrimination issue.

Paragraphs 99 and 100: These paragraphs plainly involve incorrect legal conclusions. The public policy arguments advanced in paragraph 100 are irrelevant to the issues presented in the motions. See discussion at pp. A-4—A-5, supra.

VI. FACTS RELATIVE TO SUPREMACY CLAUSE ARGUMENTS

A. **The Alleged Attempt to Regulate Gas Dedicated to Interstate Commerce.** (paragraphs 102-109; pages 52-53).

The allegations of this section undertake to describe the regulatory authority of FERC as perceived by Louisiana and as such, they involve purely legal conclusions.

B. **The Alleged Repugnancy to Comprehensive Scheme of Federal Regulation.** (paragraphs 110-116; pages 54-55).

In this section, Louisiana blandly asserts that no comprehensive federal regulatory scheme exists which is disrupted or violated by the First Use Tax. The determination of whether such a scheme exists clearly involves a conclusion of law, not fact. Elsewhere in this section, Louisiana repeats its erroneous legal assertions, discussed above and in the text, that the transportation of "raw gas" is not in interstate commerce when subjected to a first use.

C. **The Alleged Contract Nullification** (paragraphs 117-123; pages 55-57).

While the assertions in these paragraphs bear on the pipeline companies' claim that the section of the First Use Tax quoted in paragraph 117 (R.S. 47:1303C) interferes with the regulatory powers vested in FERC, determination of that interference is a legal, not factual, question. The public purpose arguments advanced in paragraphs 119-121 are of course irrelevant to determinations under Supremacy Clause. (See pages A-4—A-5, supra.

D. **The Outer Continental Shelf Lands Act Allegations** (paragraphs 124-131; pages 58-59).

The allegations in this section are purely legal and are dealt with at pages 42-61 of the brief in support of the pipeline companies' motion for judgment on the pleadings. Significantly, the Proffer does not address the pipeline companies' argument that the First Use Tax is

not only prohibited by the language and legislative history of the OCSLA, but also by the comprehensive scheme for reimbursement of coastal states for OCS-related impacts represented by the CZMA and the 1978 amendments to the OCSLA. (See pages 55-61, pipeline companies' brief in support of motions).

It should be noted that in paragraph 94 of the Proffer Louisiana admits that the First Use Tax is a tax on OCS gas or the production thereof, designed to place the same burden on such gas as the State places on gas produced within its boundaries, thus directly violating the OCSLA.

VII. FACTS RELATIVE TO EQUAL PROTECTION ARGUMENTS (paragraphs 132-145; pages 59-61).

The allegations in this section are irrelevant to the pending motions, which are in no way based on a claim that the First Use Tax violates the Equal Protection Clause of the Fourteenth Amendment. In any case, they involve merely legal conclusions, not factual issues.

VIII. FACTS RELATIVE TO IMPORT/EXPORT CLAUSE ARGUMENTS (paragraphs 146-149; page 62).

The pending motions for summary disposition are not based on a claim that the First Use Tax violates the Import/Export clause and these allegations are accordingly irrelevant.

IX. FACTS RELATIVE TO JURISDICTIONAL, STANDING AND PRUDENTIAL CONSIDERATIONS (paragraphs 150-154; pages 62-63).

All of the allegations in this section advance legal arguments, not factual disputes, and in any event are not germane to the pending motions.